16-99

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~234~~. 29

JOHN L. BACON AND H. E. C. BASKERVILLE, PARTNERS UNDER THE STYLE AND FIRM OF BACON & BASKERVILLE ET AL., APPELLANTS,

vs.

GEORGE C. RIVES, IN HIS OWN RIGHT AND AS ADMINISTRATOR DE BONIS NON, &C., OF GEORGE RIVES, DECEASED; J. HENRY RIVES, EXECUTOR OF GEORGE RIVES, DECEASED; AND ALFRED L. RIVES, EXECUTOR OF WILLIAM C. RIVES, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

FILED AUGUST 21, 1879.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1881.

BACON AND BASKERVILLE, ET AL., Appellants,

vs.

GEORGE C. RIVES, ET AL.

In printing the Brief in this case, of Counsel for the Appellee, Geo. C. Rives, the following portion of it as prepared, and which ought to have been inserted just after the date on page 3, was, by inadvertence, omitted, viz:

THE DEMURRER.

That the defence of the Statute of Limitations may be properly raised by demurrer to the Plaintiff's bill, is plain from the following authorities, viz:

1 Sto. Eq. Pl. (Ed. 1848) p. 517, Sec. 484.
" 757 " 751.
" 766 " 760.

Hudson vs. Wheeler, 34 Texas R. 362, &c.

What is styled in the transcript an "amended" bill was in fact a *substitute*, by consent, for the original bill. This accounts for its being addressed to the Judge of the State Court, and also explains why the Demurrer is to *the Bill*, and not to the *amended* Bill.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1881.

BACON AND BASKERVILLE, ET AL., - - Appellants,

vs.

GEORGE C. RIVES, ET AL.

In printing the Brief in this case, of Counsel for the pellee, Geo. C. Rives, the following portion of it as pre- ed, and which ought to have been inserted just after the e on page 3, was, by inadvertence, omitted, viz:

THE DEMURRER.

That the defence of the Statute of Limitations may be properly raised by demurrer to the Plaintiff's bill, is plain from the following authorities, viz:

1 Sto. Eq. Pl. (Ed. 1848) p. 517, Sec. 484.
" 757 " 751.
" 766 " 760.
Hudson vs. Wheeler, 34 Texas R. 362, &c.

What is styled in the transcript an "amended" bill was in fact a *substitute*, by consent, for the original bill. This accounts for its being addressed to the Judge of the State Court, and also explains why the Demurrer is to *the Bill*, and not to the *amended* Bill.

SUPREME COURT OF THE UNITED STATES.

No. 234.

JOHN L. BACON AND H. E. C. BASKERVILLE, PARTNERS UNDER THE STYLE AND FIRM OF BACON & BASKERVILLE ET AL., APPELLANTS,

vs.

GEORGE C. RIVES, IN HIS OWN RIGHT AND AS ADMINISTRATOR DE BONIS NON, &C., OF GEORGE RIVES, DECEASED; J. HENRY RIVES, EXECUTOR OF GEORGE RIVES, DECEASED; AND ALFRED L. RIVES, EXECUTOR OF WILLIAM C. RIVES, DECEASED.

[illegible] FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE [illegible] TERN DISTRICT OF VIRGINIA.

INDEX.

	Original.	Print.
.....	1	1
.....	3	2
Caption	8	3
Motion to docket case	9	3
Record from State court	10	4
Petition for removal of cause	17	7
Bond for removal of cause	21	8
Clerk's certificate	23	9
Cause docketed in United States circuit court	24	9
Motion to remand denied	24	9
Amended bill of complaint	25	9
Answers	42	15
Order reviving cause, &c	42	15
Demurrer	43	15
Decree	46	16
Appeal bond	47	17
Clerk's certificate	52	19
Affidavits of value	53	19

1 UNITED STATES OF AMERICA, *to wit:*

To George C. Rives, in his own right and as administrator de bonis non with the will annexed of George Rives, deceased; J. H. Rives, executor of George Rives, deceased; and Alfred L. Rives, executor of William C. Rives, deceased, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the Capitol, in the city of Washington, on the second Monday of October, 1879, next, pursuant to an appeal taken in the clerk's office of the circuit court of the United States for the western district of Virginia, wherein John L. Bacon & H. E. C. Baskerville, partners under the style & firm of Bacon & Baskerville; John Stewart, Robert H. Maury, Robert Ould, and Isaac H. Carrington, trustees for the benefit of the creditors of Wm. H. McFarland, dec'd, by virtue of a deed dated Octo. 20, 1870; John W. Wright, sheriff of the city of Richmond, and as such adm'r of Wm. H. McFarland, deceased, are plaintiffs; and George C. Rives, in his own right and as adm'r de bonis non with the will annexed of George Rives, dec'd; J. H. Rives, executor of George Rives, deceased; and Alfred L. Rives, executor of Wm. C. Rives, dec'd, are defendants; to show cause, if any there be, why the decree in said appeal mentioned should not be corrected, and speedy justice should not be done
2 to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

HUGH L. BOND.

Executed this 27th day of May, 1879, by delivering to J. Henry Rives a true copy of this citation in person, who says that he is not, and has not been for three years, one of the executors of Geo. Rives, dec'd.

Marshal's fee, $2.00.

JNO. F. LEWIS, *U. S. M.*,
By R. E. LATHAM, *Deputy.*

I hereby acknowledge legal and timely service of the within citation.

E. R. WATSON,
Counsel for G. C. Rives in his own right & as adm'r d. b. n. c. t. a.

JUNE 4, 1879.

(Indorsed:) Supreme Court of the United States. Bacon & Baskerville and others vs. George C. Rives and others. Citation

JOHN L. BACON & H. E. C. BASKERVILLE, partners under the firm & style of Bacon & Baskerville; John Stewart, Robert H. Maury, Robert Ould, and Isaac H. Carrington, trustees for the benefit of the creditors of Wm. H. Macfarland, deceased, by virtue of a deed dated October 20, 1870; John W. Wright, sheriff of the city of Richmond, and as such administrator of William H. Macfarland, deceased, plaintiffs and appellants,

vs.

GEORGE C. RIVES, IN HIS OWN RIGHT AND AS administrator with the will annexed of George Rives, deceased; J. Henry Rives, executor of George Rives, deceased; and Alfred L. Rives, executor of William C. Rives, deceased, defendants & appellees.

To the honorable the Supreme Court of the United States:

The appeal of John L. Bacon & H. E. C. Baskerville, partners, &c., and the others, plaintiffs and appellants above mentioned, respectfully showeth that on the first Monday in September, 1875, the above-
4 named appellants filed their bill in equity in the circuit court of Albemarle County, Virginia, against George C. Rives, Charles E. Rives, and J. Henry Rives, executors of George Rives, deceased, and Alfred L. Rives, executor of William C. Rives, deceased, demanding an account of said George C. Rives, of his actings & doings as agent & trustee of said plaintiffs & appellants, and requiring of him a discovery of the disposition and investment made by him of $131,000 of Confederate States funds committed to his care & custody for investment. The said George C. Rives, being a non-resident of the State of Virginia (of which State all the plaintiffs were residents), but having estate & property in Virginia, as devisee of George Rives, in the hands of J. Henry Rives, executor of said George Rives, a resident of Virginia, and in the hands of Charles E. Rives, executor of said George Rives, a resident of the State of New York, the plaintiffs attached the property & estate of said George C. Rives in the hands or under the control of the said J. Henry Rives & Charles E. Rives, executors
5 as aforesaid, in order to subject it to the payment of the debt due them by the said George C. Rives.

All due processes of law for effecting such attachment & for maturing the said suit for hearing were executed & performed, and the said suit was set for hearing in said court. But at the circuit court for said county held the 8th day of February, 1876, the said George C. Rives moved the said court to order the removal of the said cause to the circuit court of the United States for the western district of Virginia, which motion the said court overruled. Thereupon the said George C. Rives gave bond according to law & took the record of said cause to the circuit of the United States for the western district of Virginia, & moved the said court to docket said cause therein. This motion was granted the 30th of September, 1876, and the cause as to all parties was accordingly docketed in said court, despite the objection of these plaintiffs & appellants.

Charles E. Rives, executor, &c., having died, and George C. Rives having qualified as administrator de bonis non with the will annexed,
6 the said suit was revived as to G. C. Rives, as such administrator, by

order of court entered the 27th day of September, 1877. And at the same time the said George C. Rives, by demurrer to the bill of these appellants, raised the question of the statute of limitations as a bar to their suit. The demurrer was on the same day argued by counsel, and the court took time to consider of its judgment until the 28th day of March, 1879, when the court sustained the said demurrer, and ordered the dismissal of the original and amended bills of these appellants, with costs; and further ordered the attachments issued in this cause against the estate of the said George C. Rives, in the hands or under the control of the executors of George Rives, deceased, to be discharged; which decree was final.

Wherefore these appellants appeal from the whole of said decree of March 28th, 1879, of the said circuit court of the United States for the western district of Virginia, and pray that the decrees of the said court and the bills, original and amended, the pleadings and proceedings in the said cause may be sent to the Supreme Court of the United
7 States without delay, and that the said Supreme Court will proceed to hear the said cause anew, & that the said decrees of the circuit court, and every part thereof, may be reversed and a decree made remanding the said cause to the circuit court of Albemarle County, Virginia, with costs, or such other decree as to the said Supreme Court shall seem just.

JOS. BRYAN,
Counsel for Appellants.

(Indorsed:) Supreme Court of the United States. Bacon & Baskerville & others vs. G. C. Reves & others. Petition for appeal.

8 UNITED STATES OF AMERICA,
Western District of Virginia, ss:

Pleas before the honorable Hugh L. Bond, judge of the circuit court of the United States of America for the western district of Virginia, in the fourth circuit, held at the court-room thereof, in the of Lynchburg, on Friday, the 28th day of March, anno Domini 1879, & in the year of the Independence of the United States the 103rd.

JOHN L. BACON AND H. E. C. BASKERVILLE, partners under the style and firm of Bacon & Baskerville; John Stewart, Robert H. Maury, Robert Ould, and Isaac H. Carrington, trustees for the benefit of the creditors of William H. McFarland, deceased, by virtue of a deed dated October 20th, 1870; John W. Wright, sheriff of the city of Richmond, and as such administrator of William H. McFarland, deceased, plaintiffs,

against

GEORGE C. RIVES, A NON-RESIDENT OF THE State of Virginia; J. Henry Rives, executor; and the said George C. Rives, administrator de bonis non with the will annexed of George Rives, deceased; and Alfred L. Rives, executor of William C. Rives, deceased, defendants.

9 Be it remembered that heretofore, to wit, at a circuit court of the United States for the western district of Virginia, held at

the court-room thereof, in the city of Lynchburg, on Tuesday, the 21st day of March, in the year 1876,

Came the defendant Geo. C. Rives and filed a certified copy of the record of a suit between the above-named parties, instituted and now pending in the circuit court of the county of Albemarle, in this State, including a copy of a petition filed by said George C. Rives in said court at the last term thereof, asking for the removal of said cause into this court, and a copy of the bond of said Rives, with security, which accompanies said petition, and was tendered to and accepted by said court in accordance with the provisions of the act of Congress approved Mar. 3, 1875, in reference to the removal of causes from State courts to Federal courts, and for other purposes. The copy of the record aforesaid is ordered to be filed. And thereupon the said Rives, by counsel, moved the court to docket said cause, but as the judge of this district is so situated as to render it improper, in his opinion, to sit in the cause, or to decide any question therein, said motion
10 is continued for a hearing until some time when the judge of this court shall be present and presiding.

The record referred to in the foregoing order is in the words and figures following, to wit:

VIRGINIA, *to wit:*

Pleas before the circuit court of Albemarle County, at the court-house thereof, on the 8th day of February, 1876.

JOHN L. BACON AND H. E. C. BASKERVILLE, partners under the style and firm of Bacon & Baskerville; John Stewart, Robert H. Maury, Robert Ould, and Isaac H. Carrington, trustees for the benefit of the creditors of Wm. H. McFarland, dec'd, by virtue of a deed dated October 20th, 1870; John W. Wright, sheriff of the city of Richmond, and as such administrator of Wm. H. McFarland, dec'd, pl'ffs,

vs.

GEORGE C. RIVES, A NON-RESIDENT OF THE State of Virginia; J. Henry Rives and Charles Edward Rives, executors of George Rives, deceased; and Alfred L. Rives, executor of Wm. C. Rives, dec'd, def'ts.

Be it remembered that on the 22nd day of July, 1875, came the complainants, by counsel, and sued out of the clerk's office of said
11 court a subpœna in chancery, returnable to the first Monday in August thereafter, at rules to be held on that day, against the defendant George C. Rives, the return on which is as follows: "Executed July 22nd, 1875, by delivering a copy of the within notice to George C. Rives in person."

W. R. BURNLEY, *S. A. C.*

And on another day, to wit, at rules held in the clerk's office aforesaid, on the first Monday in September, 1875, came the complainants, by counsel, and filed their bill in chancery vs. the defendants. (Which bill is omitted in this record by direction of the plaintiffs' and defendants' attorney.)

Teste:

S. PATTERSON, *Clk.*

And on another day, to wit, on the 10th day of September, 1875, came Jos. Bryan, counsel for the complainants, to the clerk's office of said circuit court, and made oath that the defendant George C. Rives is a non-resident of the State of Virginia, and that he is a resident of the State of Texas; that the affiant believed the said George C. Rives has estates or debts due him within the county of Albemarle, a part of which is the interest of the said defendant in the real estate of
12 which his father, the late George Rives, died seized and possessed, known as Sherwood, lying near Carter's Mountain, & containing about 942 acres; and that the plaintiffs have a present cause for suit against the said George C. Rives, to require from him an account of the disposition made by him of one hundred and thirty-one thousand dollars of Confederate currency, placed by them in the year 1864 in the hands of the said George C. Rives, the defendant, as their agent, for investment.

Whereupon the complainants, by their said counsel, sued out of said clerk's office subpœnas in chancery against the defendants, to appear at rules to holden therein on the 1st Monday in November, 1875, to *and* the bill in chancery exhibited against them by the said complainants; the endorsements & returns on which subpœnas were as follows:

(Endorsements:) MEMO.: The officer serving this summons is ordered to attach the interest of George C. Rives in the real estate now in the possession of J. Henry Rives and C. Edward Rives, as executors of George Rives, dec'd, of which George Rives died seized and possessed,
13 known as Sherwood, near Carter's Mountain, in Albemarle County, containing about 942 acres; also any debts due or to become due to said defendant, George C. Rives, by the said defendants, J. Henry Rives and C. Edward Rives, as executors of George Rives, dec'd; and also any other estate of the said George C. Rives in the hands of the said J. Henry Rives or in the hands of any other of the defendants.

Teste:

BENNETT TAYLOR, *Clerk.*

Returns.

Executed Octo. 14th, 1875, as to George C. Rives, by delivering to him a true copy of the within notice in person.

D. L. SMITH, *D. S.*,
For W. R. BURNLEY, *S. A. C.*

Executed Octo. 11th, 1875, by delivering to C. Edward Rives, ex'or of Ge o. Rives, a copy of this s'p'a in ch'y.

C. H. BURNLEY, *D. S.*,
For W. R. BURNLEY, *S. A. C.*

The sheriff also returned a levy of the above attachment on the estate of George C. Rives in Albemarle County, above described.

And at rules held in the office of said court, on the 1st Monday
14 in November, 1875, came the complainants, by their attorney, and the defendants George C. Rives and C. Edward Rives, on whom process had been duly executed, not appearing, on the motion of the complainants it is ordered that the bill be taken for confessed, and the cause set for hearing as said defendants, unless they shall appear and answer at the next rules.

At which day, to wit, rules held in said office on the 1st Monday in December, 1875, the said defendants not appearing, the bill was taken for confessed, & the cause set for hearing as to them.

And on another day, to wit, on the 29th day of November, 1875, came the complainants, and having filed their affidavit that Alfred L. Rives, executor of Wm. C. Rives, dec'd, was a non-resident of the State of Virginia, sued of said clerk's office an order of publication, requiring him to appear there within *within* one month after due publication of said order, and do what was necessary to protect his interest in this suit, and directing that a copy of said order be published once a week, for four successive weeks, in the Charlottesville Chron-
15 icle, and another copy thereof posted at the front door of the court-house of Albemarle County on the first day of the next county court.

And on another day, to wit, on the 22nd day of December, 1875, came the complainants, by counsel, and sued out of said clerk's office an alias subpœna in chancery against the defendant J. Henry Rives, one of the executors of Wm. C. Rives, with endorsement of attachment thereon as heretofore, directed to the sergeant of Lynchburg, requiring him to appear and answer the plaintiffs' bill at rules to be holden in said office on the 1st Monday in January, 1876, the return on which is as follows: "Executed in the city of Lynchburg, by delivering to J. Henry Rives, executor of George Rives, dec'd, a true copy of the within subpœna in chancery, December 23rd, 1875, at 10 a. m.

J. W. HUGHES, *D. S.*;
For H. HUGHES, *S. C. L.*

And at rules held in the clerk's office of said court on the first Monday in January, 1876, the defendant not appearing, it was ordered that the bill be taken for confessed as to said defendant J. Henry Rives, and the cause set for hearing, unless he appear and answer at the next rules.

16 At which day, to wit, at rules held in said office on the last Monday in January, 1876, said defendant not appearing, and the order of publication against the defendant Alfred L. Rives having been duly published and posted more than thirty days before said day, according to law, on the motion of the complainants the said bill is taken for confessed, and the cause set for hearing as to said defendants, J. Henry Rives and Alfred L. Rives.

And now, on this day, to wit, at a circuit court held for said county on the 8th day of February, 1876,

This day came the plaintiffs, by their counsel, and the defendant George C. Rives, by his counsel, and the latter filed his petition, accompanied by a proper bond, praying that this cause may be removed to the circuit court of the United States for the western district of Virginia, held at Lynchburg, in pursuance of the provisions of the act of Congress approved March 3rd, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes." The plaintiffs, by their counsel, objected to the removal of the cause as prayed for, upon the ground that as one of the defendants, viz,
17 J. Henry Rives, one of the executors of Geo. Rives, dec'd, is a resident of the same State with the plaintiffs, the circuit court

aforesaid has no jurisdiction of the suit, and that Geo. C. Rives, tho' a non-resident defendant, has no right to the removal of said suit, as prayed for, according to the true intent and meaning of the act of Congress aforesaid.

And the court being of that opinion, rejected the petition and refused to grant the prayer thereof.

And on the motion of the said George C. Rives, his petition aforesaid, and the bond tendered by him, which has been duly executed, and the surety to which the court believes to be good and satisfactory, to be made a part of the record; which is done.

Petition of George C. Rives.—Filed Feb'y 8th, 1876, & ordered to be made part of record.

To the hon. judge of the circuit court of Albemarle County:

Your petitioner, George C. Rives, respectfully represents that there is now pending in this your honor's court a suit in *in* chancery, in which the following persons, who are citizens and residents of the city of Rich-
mond, in the State of Virginia, are plaintiffs, viz, John L.
18 Bacon and H. E. C. Baskerville, partners under the style & firm of Bacon & Baskerville; John Stewart, Robert H. Maury, Robert Ould, and Isaac H. Carrington, trustees for the benefit of the creditors of William H. Macfarland, dec'd; and John W. Wright, sheriff of the city of Richmond, and as such adm'r of Wm. H. McFarland, dec'd; and the following persons are defendants, viz, your petitioner, George C. Rives, J. Henry Rives and Charles Edward Rives, executors of George Rives, dec'd; and Alfred L. Rives, executor of Wm. C. Rives, dec'd. At the time of the institution of this suit all of said defendants, with the exception of J. Henry Rives, were and they are still non-residents of the State of Virginia; that is to say, your petitioner was and is a citizen and resident of the State of Texas; Charles Edward Rives, a citizen and resident of the State of New York; and Alfred L. Rives, a citizen and resident of the State of Alabama. The said J. Henry Rives was and is a citizen of Virginia, residing in the city of Lynchburg.

The object of the suit aforesaid, as appears upon the face of the bill, is to compel your petitioner to render an account of his agency,
19 in undertaking, as the bill alleges, to invest in the State of Texas, during the late war between the United States and the so-called Confederate States, a large amount of Confederate funds belonging to the plaintiffs, and confided by them to the petitioner for investment aforesaid. The bill further alleges that your petitioner is interested in the estate of his father, George Rives, dec'd, of which the defendants J. Henry Rives, of Virginia, and Charles Edward Rives, of New York, are the executors; and the further object of this suit is, if on such account your petitioner shall be found indebted to the plaintiffs, to subject to the payment of such indebtedness his interest in the estate of his father, in the hands of his executors aforesaid. Alfred L. Rives, executor of William C. Rives, dec'd, is made a party defendant to the suit because, as is alleged, a part of the Confederate funds confided to your petitioner for investment as aforesaid belonged to the said Wm. C. Rives, whose executor has not been requested to become a party plaintiff to the suit.

Your petitioner denies all liability whatever growing out of his alleged agency as set out in the bill, so that it manifestly appears
20 that the controversy involved in said suit is one between the plaintiffs as citizens of Virginia on one side, and your petitioner, a citi-

zen of Texas on the other, your orator is not apprized, whether the defendant, Alfred L. Rives, as ex'or of Wm. C. Rives, dec'd, asserts any claim against your petitioner, in connection with the matters set out in the bill, but as already stated, he, as well as the plaintiffs, is a citizen of a different State from that in which your petitioner resides.

On the one side, your petitioner is the only party to the controversy involved in the suit.

Your petitioner is advised that, according to the provisions of the second section of the act of Congress as passed and amended March 3rd, 1875, he is entitled to have the suit aforesaid removed from your honor's court to the circuit court of the United States for the western district of Virginia, which is held at Lynchburg. The act of Congress just referred to is entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," and is found in U. S. Statutes at Large, 18 vol., p. 470.

21 And your petitioner accordingly prays for the proper order for such removal upon the terms and conditions of said act.

The original papers of the suit aforesaid will show that this petition is filed within the proper time because said suit has not been tried, and this is indeed the first term of your honor's court since its institution at which it could have been tried or heard to any extent whatever.

All of which is respectfully submitted.

GEORGE C. RIVES.

Alfred L. Rives, ex'or of Wm. C. Rives, dec'd, residing in Alabama, unites in the foregoing petition.

Bond.

Know all men by these presents, that we, George C. Rives and C. Edward Rives, are held and firmly bound unto John L. Bacon & H. E. C. Baskerville, partners under the style and firm of Bacon and Baskerville; John Stewart, Robert H. Maury, Robert Ould, and Isaac H. Carrington, trustees for the benefit of the creditors of Wm. H. MacFarland, dec'd, by virtue of a deed dated 20th Octo., 1870; John W. Wright, sheriff of the city of Richmond, and as such adm'r of Wm. H. Macfarland, dec'd, in the just and full sum of two hundred and fifty dollars,

22 for the true payment whereof to the said obligees we bind ourselves, our heirs, and executors, or administrators, jointly and severally, by these presents.

The condition of the above obligation is such that whereas the obligees aforesaid, all citizens of the State of Virginia, having instituted a chancery suit in the circuit court for the county of Albemarle against Geo. C. Rives, one of the obligors above named, and other defendants, all of whom are non-residents of Virginia, and the said Geo. C. Rives *and the said George C. Rives* being desirous of removing said suit into the circuit court of the United States for the western district of Virginia, has filed his petition praying for such removal, and desires to give bond as required by the act of Congress in such cases made and provided, approved March 3rd, 1875: Now, therefore, if the said George C. Rives shall enter into the circuit court of the United States for the western district of Virginia, on the first day of the next session thereof, to be held at Lynchburg, a copy of the record of said suit, and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed there-

23 to, then this obligation to be void, or else to remain in full force and virtue.

Given under our hands & seals this 11th day of October, 1875.

GEORGE C. RIVES. [SEAL.]
C. EDWARD RIVES. [SEAL.]

Acknowledged by Geo. C. Rives and C. Edw'd Rives, as their deed, before me, a notary public in and for the county of Albemarle, this day, and at the same time C. Edw'd Rives made oath before me that after payment of his own debts, and such as he expects to pay as surety for others, his estate is worth more than $250 over and above his homestead rights. Given under my hand this 11th Octo., 1875.

GEO. PERKINS, *N. P.*

CLERK'S OFFICE OF ALBEMARLE CIR. C'T.

I, Bennett Taylor, clerk of Albemarle circuit court, do hereby certify that the foregoing pages, numbered from 1 to 21, inclusive, contain a true and complete copy of the record of the cause therein named (Bacon & Baskerville, &c., v. Rives, &c.), as it appears in said office.

Witness my hand this 17th day of March, 1876.

BENNETT TAYLOR, *C. C.*

24 And at another day, to wit, at a circuit court of the United States for the western district of Virginia, held at the court-room thereof, on Friday the 29th day of September, 1876.

At the previous term of this court a motion was made by the defendant George C. Rives, a citizen of Texas, to docket in this court this suit, which upon his petition he had removed from the circuit court of Albemarle County, Virginia, under the act of Congress approved March 3, 1875. But, for reasons of a personal character, the district judge then presiding entered an order declining to hear the motion, and directed it to be made before the judge of the circuit court. And come the parties respectively, by their attorneys, and the said George C. Rives renews his motion to docket the said suit; and the court doth accordingly so order; and thereupon the plaintiffs moved the court to remand the said suit to the said circuit court of Albemarle, but the court being of opinion that, under the act of Congress of March 3, 1875, the said defendant George C. Rives is entitled to remove the said suit to this court from the circuit court of Albemarle, doth over-

25 rule the motion of the said plaintiffs, and order the cause to be proceeded with accordingly in this court. And upon motion of the plaintiffs leave is granted them to file an amended bill, and the same is accordingly filed. And this cause is continued.

The said amended bill is in the words and figures following, to wit:

To the honorable Henry Shackelford, judge of the circuit court of Albemarle County, Virginia:

The bill of John L. Bacon and H. E. C. Baskerville, partners under the style & firm of Bacon & Baskerville; John Stewart, Robert H. Maury, Robert Ould, and Isaac H. Carrington, trustees for the benefit of the creditors of Wm. H. Macfarland, deceased, by virtue of a deed dated October 20th, 1870; John W. Wright, sheriff of the city of Richmond, &, as such, administrator of William H. Macfarland, deceased, plaintiffs, against George C. Rives, a non-resident of the State of Virginia; J. Henry Rives and Charles Edward Rives, executors of George Rives, deceased; and Alfred L. Rives, executor of William C. Rives, deceased, defendants.

26 Humbly complaining, shew unto your honor your orators, the

plaintiffs above mentioned, that some time in the summer of the year 1863 they, in connection with the honorable William C. Rives, deceased, the uncle of the defendant George C. Rives, sent the sum of one hundred & thirty-one thousand dollars ($131,000) of Confederate States treasury notes, the currency at that time of Virginia, Louisiana and Texas, to Col. James H. Stevens, then in Monroe, Louisiana, with instructions to the said Stevens to invest or expend the same in the purchase of cotton on plantations in Louisiana and Texas, to remain on the plantations until the war was over.

Of this sum of $131,000 Bacon & Baskerville owned $48,000, John Stewart owned $48,000, Robert H. Maury owned $10,000, William H. Macfarland owned $5,000, and William C. Rives owned $20,000. But, since that time, Bacon and Baskerville have become possessed of and now own $80,000, while John Stewart's interest therein has become and is now $16,000, the interest of the other plaintiffs remaining the same.

The funds were sent by Bacon & Baskerville, and all the business negotiations were conducted and all instructions given by them,
27 but the proceeds of the investment, which your orators confidently believed would be very great, were to be divided among the parties above named in proportion to their respective interests as set forth. The personal representative of the late Wm. C. Rives has not joined in this suit, nor has he been solicited to join by your orators for reasons of a personal nature, which will be apparent to your honor when this bill has been read, but your orators have made him a party defendant in order that all parties in interest might be before this court.

Your orators further shew unto your honor that about the 3rd day of September, 1863, the said Col. James H. Stevens died in the upper part of Louisiana, while on his way to Texas, without having invested any of the funds committed to his care in the manner directed by your orators, or in any other manner. But your orators were thereafter soon informed *not only* by the widow and executrix of the said Stevens that she held the funds aforesaid subject to their order. And the defendant George C. Rives likewise wrote to that effect to his cousin, Lt. Col. Alfred L. Rives, the son & now executor of the Hon. Wm. C. Rives. And your orators, moved by the advice and solicitation
28 of the said Wm. C. Rives, as well as by the encouraging character of certain letters written by the defendant George C. Rives to his cousin, the said Alfred L. Rives, which letters were shown to your orators (the said defendant, G. C. Rives, being aware & informed of the venture and enterprise of his uncle & of your orators in the direction above set forth), and moved especially by the declarations of the said defendant G. C. Rives, in his letter aforesaid, that if the money ($131,000) which had been held by Col. J. H. Stevens was turned over to him he could save it by investing it in city property in the city of Austin, Texas, or in live stock (ranche), which, as he said, he knew would pay well and could be readily sold at any time, and that he would attend to the interest of the parties concerned (your orators & Wm. C. Rives) and act under their instructions, your orators determined to make, and did make and appoint the defendant George C. Rives their agent, in the room and stead of the said Col. James H. Stevens.

And having so made him their agent, they ordered and directed the funds which had been held by the said Stevens to be paid by his
29 widow into the hands of the said George C. Rives. And your orators further believe and so charge that the said sum of $131,000 was paid to the said George C. Rives, not in depreciated

"old issue" Confederate notes, but was paid to him chiefly if not entirely in Confederate funds of greater value than the "old issue," and this your orators allege, although the said G. C. Rives has suggested that he received old issue Confederate notes. And your orators believe & charge further that the said payment of $131,000 was made to the said George C. Rives in the latter part of the year 1863 or early in the year 1864; but, however that may have been, the said George C. Rives, when he received the said $131,000, whether in old issue currency or other funds of the Confederate States, received and took the same for investment as the agent & for the benefit of your orators, with his agency and authority narrowed & limited by the following instructions from Bacon & Baskerville, who were acting as the managers and business negotiators of this enterprise and venture with the consent & concurrence of the other joint owners of the said funds; that is to say, the said instructions were:

1st. That the said George C. Rives was to invest the said funds in cotton on plantations in Texas, to remain thereon until the war
30 was over, this being the first & chief object of the whole venture; but if the said defendant G. C. Rives could not succeed in this, he was,

2ndly. To invest said funds in ranche property, meaning thereby lands in Texas with cattle & horses thereon; and if in this he failed, he was,

3rdly. To invest said funds in town lots in the city of Austin, Texas.

And of all his proceedings under these instructions he was, of course, as was his manifest duty, to make full report to your orators as to the disposition he should have made of the funds thus implicitly confided as a special trust to him.

And your orators allege that the idea of the said G. C. Rives buying cotton to be sent out of the country by him before the end of the war was never entertained by them, nor did the said George C. Rives have any authority either for that or for entering into any partnership or other arrangement for any such transaction, nor was he authorized to use the property of your orators otherwise than as is above set forth. But your orators shew unto your honor that after the delivery of the funds above mentioned to the said George C. Rives, as has been
31 set forth, they heard nothing from him until in response to a letter from Bacon & Baskerville, written to him on the 27th day of January, 1865, he wrote a letter dated the 5th day of April, 1865, which was received by the said Bacon & Baskerville a month or more thereafter, in which he stated that he had invested the property of your orators in a manner totally different from the instructions and directions he had received, to wit, in the transportation of cotton under articles of copartnership to continue during the war, and that the business was under the management of an active partner who gave his whole time and attention to it; but he did not state who the said active partner was, nor how much of the funds he had so invested, nor what property he had purchased therewith, nor what proceeds, if any, had accrued to him from the investment aforesaid. Still your orators hoped, although their orders had been disregarded, that a fair and honest return would eventually be made by their agent aforesaid, but they by no means approved of his departure from their instructions.

Your orators further show, however, that after the end of the war, having waited nearly eighteen months without any report or
32 statement whatever having been received by them from their said agent, George C. Rives, the said Bacon & Baskerville, in

the month of November, 1866, wrote to the said George C. Rives to Austin City, Texas, asking an account from him of his agency aforesaid, to which letter no reply whatever was made by any one. Then the said Bacon & Baskerville, on the 26th day of January, 1867, wrote again to the said Rives to the same place, asking again an account of his said agency, but neither was any reply whatever received to that letter. And your orators allege that as they had not had since the receipt of the letter from the said George C. Rives, dated the 5th day of April, 1865, as above set forth, received from their said agent any account, statement, letter, note, or information whatever stating what disposition he had made of the $131,000 entrusted to him, they had almost come to believe that the said Rives had either died or left the country.

But sometime about the month of March, 1875, they learned accidentally that the said Rives was not only living, but for several years past had visited Virginia each summer. Thereupon the said Bacon & Baskerville wrote again to the said George C. Rives, asking an
33 account of his said agency, but they likewise received no reply to this letter. They also wrote about this time, as they had done before, to Lt Col. Alfred L. Rives, now executor of the Hon. Wm. C. Rives, deceased, asking information of him concerning their agent, the said George C. Rives, but neither did they receive any reply from him, nor have any of the letters above mentioned as written to the said George C. Rives and Alfred L. Rives ever been returned to the writers through the dead-letter office, as is usually done with letters not delivered to the parties to whom they are addressed.

Your orators further allege that as soon as possible after learning the whereabouts of the said George C. Rives they instituted this suit to enforce an account from him of his actings and doings as their agent aforesaid and for the other purposes herein mentioned. And your orators further allege that they have been informed by the said George C. Rives since these legal proceedings were instituted against him that he did write once to the said Bacon & Baskerville soon after the end of the war, informing them that the investment of the funds entrusted to him, as hereinbefore mentioned, had almost entirely failed, & requesting instructions as to the disposition he should make
34 of the remnant in his hands. Your orators aver, however, if such a letter ever was written by the said George C. Rives that it never came into their possession or knowledge, & of course it received no reply; but they charge that it was the plain and manifest duty of the said George C. Rives to write more than one letter in ten years, even if he did receive no reply to his first communication, in order to give an account of and explain his conduct as agent of your orators in so important a trust; and if he could get no reply through the mails, the said George C. Rives, in order to give the account aforesaid & to explain his conduct as agent aforesaid, if he had desired to do so, might easily have seen in person some one of your orators when he paid his summer visits to Virginia, as hereinbefore set forth. Your orators, therefore, with regret, charge that the retention by the said George C. Rives in his own possession of the whole proceeds of his investment of $131,000 entrusted to him by your orators, and his silence as to his trust for nearly ten years, and his failure to render your orators any account whatever of his stewardship arose from an intention on his part to defraud your orators of the funds entrusted
35 to him, or of the proceeds of the investment thereof made by himself.

And now your orators further show unto your honor that in 1874, George Rives, the father of the defendant George C. Rives, died in the county of Albemarle, Virginia, possessed of a large estate, real and personal, and that by his will, which was duly admitted to probate in the county court of said county, the said defendant George C. Rives is to a considerable extent interested therein.

And your orators further charge & show that J. Henry Rives and Charles Edward Rives duly qualified as executors of the said George Rives. And your orators further charge & aver that the said George C. Rives is a non-resident of the State of Virginia, being a resident of the State of Texas, & they pray that the interest of the said George C. Rives in the estate of which his father, the said George Rives, died possessed, whether the same be in the real estate of which he died seized & possessed, or the personal estate, or debts, or demands due the said George Rives in the hands of his executors aforesaid, may be attached to pay whatever may be shown to be due your orators upon the statement & account hereby prayed for.

36 And your orators further show unto your honor that in the year , the honorable William C. Rives died, and that Alfred L. Rives qualified as executor of his estate.

And your orators further show unto your honor that in , 1873, William H. Macfarland died, but that before his death he executed a certain deed on the 20th day of October, 1870, whereby he conveyed all of his property of every kind in possession or in action to Robert Ould and Isaac H. Carrington, trustees, for the benefit of his creditors, and as no administration was had upon the estate of the said W. H. Macfarland in this State, the same was committed to John W. Wright, sheriff of the city of Richmond.

Wherefore in tender consideration of the premises, and forasmuch as your orators are remediless save in a court of equity, your orators pray that the said George C. Rives, and the said J. Henry Rives and Charles Edward Rives, executors of George Rives deceased, and Alfred L. Rives, executor of William C. Rives, deceased, may be made parties defendant to this bill, and be required full, true, & complete answers

37 to make upon oath to all and singular the allegations and charges in this bill set forth.

And that the said George C. Rives may be required to render a full and complete account of all his actings & doings as agent aforesaid of your orators, and show what disposition or investment he made of the funds aforesaid and what the proceeds of such investment have been, and if no investment was made by him according to the instructions given him as aforesaid, nor any other investment of the benefit of which your orators may choose to avail themselves, then that the said George C. Rives may be required to pay to your orators the value of the funds committed to his hands as agent aforesaid, with lawful interest thereon.

And without waiving a full and complete answer under oath to the allegations & charges as set forth in this bill, but requiring the same of the defendants aforesaid, your orators further say that to the end that the said defendants may, if they can, show why your orators should not have the relief hereby prayed for, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the

38 several interrogatories hereinafter numbered and set forth as by

the note hereunder written they are respectively required to answer; that is to say:

The said George C. Rives shall answer the following interrogatories:

1. Did you not solicit through Lt. Col. A. L. Rives, or otherwise, the appointment of the agency for the investment of the $131,000 referred to in this bill, and did you not promise that if the said $131,000 was entrusted to you, you would exert yourself to make it a profitable investment to the owners thereof?

2. What was the year and day on which you received the aforementioned $131,000?

3. In what kind of Confederate funds was this sum of $131,000 paid to you?

4. What was the gold value of the $131,000 in Austin City, Texas, at the time it was paid to you?

5. When did you first invest the said sum of $131,000 or any part of it?

6. Give the exact details of the kinds of property you purchased with the $131,000 or any part of it?

7. If you did not invest the said $131,000 as you were instructed to do, what prevented you from carrying out your instructions?

39 8. What disposition did you make of the property you purchased with the $131,000 aforesaid; when did you dispose of it, and what were the proceeds of this property you so disposed of?

9. Did you not have in your possession after the end of the war some property which was the proceeds of your investment in whole or in part of the $131,000?

10. If you had any such property of what did it consist?

11. What have you done with that property?

12. Why did you not give an account of that property to the parties to whom it belonged?

13. What is the name & residence of the active partner engaged with you in the transportation of cotton under the acticles of copartnership referred to in your letter dated April 5th, 1865, & mentioned in this bill?

Interrogatories to be answered by the defendants J. Henry Rives and Charles E. Rives, executors of George Rives, dec'd.

14. State in what real estate devised by your decedent Geo. Rives, or of which he died siezed & possessed, now in your possession or under your control, the said George C. Rives is interested,
40 and what is the probable value of such interest of the said George C. Rives.

15. State in what personal estate, or debts & demands due the estate of your decedent, George Rives, the defendant George C. Rives is interested, & what the probable value of his interest therein is.

And your orators further pray that in addition to the relief above prayed for your honor will grant them such other & further relief as to your honor may seem meet and that equity and justice may require.

And in duty bound your orators will ever pray.

JOS. BRYAN, *P. Q.*

NOTE.—Interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 are to be answered by the defendant G. C. Rives.

Interrogatories 14 & 15 are to be answered by the defendants J.

Henry Rives and C. Edward Rives, executors of George Rives, deceased.

J. BRYAN, *P. Q.*

41 And at another day, to wit, at rules held in clerk's office of the circuit court of the United States for the western district of Virginia, on the first Monday in October, 1876, being the second day of the month, the defendants George C. Rives, J. Henry Rives and Charles Edward Rives, executors of George Rives, deceased, and Alfred L. Rives, executor of William C. Rives, dec'd, failing to appear and plead, answer, or demur to the said bill, on the motion of the plaintiffs, by Joseph Bryan, gentleman, their attorney, it was ordered that the same would be taken for confessed unless they should appear and plead, demur to, or answer the said bill at the then next rules.

At which day, to wit, at rules held in the clerk's office of the said court on the first Monday in November, 1876, being the 6th day of the month, the said defendants still failing to appear and plead, answer, or demur to the said bill, on the motion of the plaintiffs by Joseph Bryan, gentleman, their attorney, it was ordered that the same be taken for confessed and the cause set for hearing at the then next term.

And at another day, to wit, at a circuit court of the United States for the western district of Virginia, held at the court-room thereof
42 in the city of Lynchburg, on Wednesday, the 21st day of March, 1877.

On the motion of George C. Rives, by counsel, and upon condition that the trial of this cause is not to be thereby delayed, leave is granted him to file his original and supplemental answers to the amended bill of the plaintiffs; whereupon he filed the same, and the said plaintiffs replied generally to said answers.

(Said answers are omitted in this record by direction of the attorneys for the plaintiffs and defendants.)

Teste:

S. PATTERSON, *Clk.*

And at another day, to wit, at a circuit court of the United States for the western district of Virginia, held at the court-room thereof in the city of Lynchburg, on Thursday, the 27th day of September, 1877, Charles Edward Rives, one of the ex'ors of George Rives, deceased, having died since the last term of the court, on the motion of the plaintiffs and by consent of George C. Rives, who has qualified as administrator de bonis non with the will annexed of said Geo. Rives, deceased, this cause is ordered to be revived against him as such administrator.

And on the motion of the defendant Geo. C. Rives, by counsel, and by consent of the plaintiffs by their counsel, leave is given to
43 said Rives to withdraw his answer heretofore filed, and to file his demurrer to the plaintiffs' bill, and thereupon said defendant withdrew his answer and filed his demurrer to the bill, and the plaintiffs joined in said demurrer. And it is agreed by plaintiffs by their counsel that said demurrer shall be considered as supported by answer properly denying fraud, and that should said demurrer be overruled by the court the defendant Geo. C. Rives may file his original and supplemental answers, now among the papers, and any defence sought to be made therein shall not be prejudiced by the decision of the demurrer.

The said demurrer is in the words and figures following, to wit:

In the circuit court of the United States for the western district of Virginia, at Lynchburg.

BACON & BASKERVILLE & OTHERS, PL'T'FFS,
vs.
GEO. C. RIVES AND OTHERS, DEFENDANTS.

The demurrer of Geo. C. Rives, one of the defendants, to the bill of complainants.

This def't, by protestation, not confessing or acknowledging
44 all or any of the matters and things in said complainants' bill contained to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur as follows, viz:

As to so much of said bill as seeks relief or discovery against this defendant, in respect to the matters and things alleged in said bill, the defendant demurs, and for cause of demurrer says that according to the shewing of the plaintiffs' bill their cause of action, if they ever had any, did not accrue within five years before the institution of this suit; and therefore their right to sue was barred at the time of the institution of said suit, not only by the statute of limitations of the State of Texas, in which State, as shewn by the bill, the contract sued on was made, but by the like statute also of the State of Virginia. By the former the period of limitations is two years upon a contract by parol and 4 years on a contract in writing; by the latter five years. It is true that in Texas the running of the statute was suspended from the day of until the 30th day of March, 1870; and that in Virginia there was a like suspension from the 17th day of April, 1861, until the
1st Jan'y, 1869. But the subpœna in this suit was issued on the
45 22nd July, 1875, more than five years since the suspension of the Texas statute ceased, and more than six years since the Virginia statute began to run again. The plaintiffs' cause of action, if it ever existed, certainly existed as far back as the close of the late civil war.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and he prays to be hence dismissed, with his reasonable costs in this behalf sustained.

WATSON & PERKINS,
Counsel for Geo. C. Rives.

The undersigned, E. R. Watson, of counsel for Geo. C. Rives in the suit in which the foregoing demurrer is filed, hereby certifies that, in his opinion, the said demurrer is well founded in point of law.

Given under my hand this 21st August, 1876.

E. R. WATSON.

WESTERN DISTRICT OF VIRGINIA:

Geo. C. Rives, the party in whose favor the foregoing demurrer is filed, this day made oath before the undersigned that said demurrer is not interposed for del'y.

46 Given under my hand this 25th day of August, 1876.

T. L. MICHIE,
U. S. Com'r W'n Dist. of Va.

And now at this day, to wit, at a circuit court of the United States for the western district of Virginia, held at the court-room thereof, in the city of Lynchburg, on Friday, the 28th day of March, 1879, being the same day and year first herein mentioned,

This cause came on this day to be heard on the bills, original and amended, the demurrer thereto of the defendant Geo. C. Rives, with the plaintiffs' joinder in demurrer and the consent order entered herein on the 27th day of September, 1877, and was argued by counsel. On consideration whereof the court is of opinion that the matter of law arising on the demurrer is with the defendant, and doth therefore adjudge, order, and decree that said demurrer be sustained; that the plaintiffs' bills, original and amended, be dismissed; and that said plaintiffs pay to the defendant Geo. C. Rives his costs by him about his defence in this behalf expended. And the court doth further adjudge, order, and decree that the attachment issued in this cause against the executors of Geo. Rives, dec'd, be, and the same is hereby, discharged.

47 And afterwards, to wit, in the clerk's office of the said court, on Thursday, the 15th day of May, 1879, came the plaintiffs and filed their appeal bond, in the words and figures following, to wit:

Supreme Court of the United States of America.

JOHN L. BACON AND H. E. C. BASKERVILLE, partners under the firm and style of Bacon & Baskerville; John Stewart, Robert H. Maury, and Isaac H. Carrington, trustees for the benefit of the creditors of Wm. H. Macfarland, deceased, by virtue of a deed dated October 20, 1870; John W. Wright, sheriff of the city of Richmond, and as such administrator of William H. Macfarland, deceased, plaintiffs & appellants,

vs.

GEORGE C. RIVES, A NON-RESIDENT OF THE State of Virginia, in his own right and as administrator with the will annexed of George Rives, deceased; J. Henry Rives, executor of George Rives; and Alfred L. Rives, executor of Wm. C. Rives, deceased, defendants & appellees.

Know all men by these presents that we, John L. Bacon, of the city of Richmond, and John Stewart, of the county of Henrico, Virginia, are held and firmly bound unto George C. Rives, in his own right and as administrator with the will annexed of George Rives, deceased;

48 J. Henry Rives, executor of George Rives; and Alfred L. Rives, executor of Wm. C. Rives, deceased, in the sum of five hundred dollars, to be paid to the said George C. Rives, adm'r d. b. n. c. t. a.; J. H. Rives, executor, and Alfred L. Rives, executor, their heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and one and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 9th day of May, A. D. 1879.

Whereas the above-named plaintiffs and appellants have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the western district of Virginia:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs and appellants shall prosecute their said appeal to effect, and answer all damages and costs if they fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN L. BACON, [SEAL.]
By JOS. BRYAN, *Att'y in Fact.*
JOHN STEWART, [SEAL.]
By JOS. BRYAN, *Att'y in Fact.*

Sealed and delivered in presence of—
HUGH L. BOND.

49 (Endorsement:) Approved May 9, 1879.
HUGH L. BOND.

The following is a copy of the power of attorney executed by the said John L. Bacon and John Stewart, constituting the said Joseph Bryan their true and lawful attorney to sign their names to the foregoing bond, to wit:

Circuit court of the United States for the western district of Virginia.

JOHN L. BACON & H. E. C. BASKERVILLE, partners under the style and firm of Bacon & Baskerville; John Stewart, Robert H. Maury, Robert Ould, and Isaac H. Carrington, trustees for the benefit of the creditors of *of* Wm. H. Macfarland, deceased, by virtue of a deed dated October 20th, 1870; John W. Wright, sheriff of the city of Richmond, and as such administrator of Wm. H. Macfarland, deceased, plaintiffs,
against
GEORGE C. RIVES, IN HIS OWN RIGHT AND as administrator de bonis non with the will annexed of George Rives, deceased; J. Henry Rives, executor of George Rives, deceased; and Alfred L. Rives, executor of William C. Rives, deceased, defendants. } In equity.

Whereas the plaintiffs above mentioned are about to take an appeal from a final decree of said court in said suit, rendered the 28th
50 day of March, 1879, to the Supreme Court of the United States, and to this end a proper and sufficient bond to be approved according to law is required of said plaintiffs to prosecute their said appeal to effect and to answer all damages and costs if they shall fail to make good their plea: Now, therefore, know all men by these presents that we, John L. Bacon, of the city of Richmond, Virginia, and John Stewart, of Henrico County, Virginia, have made, constituted, and appointed Joseph Bryan, of Henrico County, our true and lawful attorney, for us and in our names to sign such bond as may be required by law for the prosecution of said appeal to effect, and to answer all damages and costs if the said plaintiffs shall fail to make good their

plea, and to acknowledge such signatures for us before the proper officers as we ourselves could acknowledge the same in our own proper persons.

Witness the following signatures and seals this second day of May, A. D. 1879.

J. L. BACON. [SEAL.]
JOHN STEWART. [SEAL.]

STATE OF VIRGINIA,
City of Richmond, to wit:

I, M. F. Pleasants, a United States commissioner, do certify
51 that John L. Bacon and John Stewart, both of whom are personally known to me, have acknowledged their signatures severally before me to the above power of attorney, executed by them to Joseph Bryan, and dated the second day of May, 1879.

Given under my hand and official seal this third day of May, 1879.

M. F. PLEASANTS,
U. S. Com'r, E. D. Va.

52 UNITED STATES OF AMERICA,
Western District of Virginia, ss:

I, S. Patterson, clerk of the circuit court of the United States for the western district of Virginia, do hereby certify that the foregoing is a true transcript of the record and proceedings in a certain chancery cause, lately depending in the said circuit court, between Bacon and Baskerville and others, plaintiffs, and George C. Rives and others, defendants, with all things touching the same, as fully and wholly as they now exist among the records of my office.

In testimony whereof I hereto set my hand and annex the seal of the said court, at the city of Lynchburg, this 27th day of May, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the 103rd.

[SEAL.] S. PATTERSON, *Clerk.*

The fee of the clerk of the circuit court of the United States for the western district of Virginia, at Lynchburg, for making out this transcript of the record, writing certificate, and annexing seal is $15.65 *cents.*

53 In the Supreme Court of the United States.

JOHN L. BACON & H. E. C. BASKERVILLE & others, appellants,
vs.
GEORGE C. RIVES, IN HIS OWN RIGHT, &c., & & others, appellees.

To George C. Rives, in your own right and as administrator de bonis non, with the will annexed, of George Rives, and J. Henry Rives, executor of George Rives, and Alfred L. Rives, executor of William C. Rives.

Take notice that on 30th day of July, 1879, I will, at the office of Joseph Bryan, esq., No. 1002 Main street, Richmond, Virginia, at the hour of 12 m., proceed to take affidavits to show the gold value of the $131,000 of Confederate States funds committed to the care of George

C. Rives, as set forth in the bill of complaint, and if, from any cause, the said affidavits are not on that day and in that place completed, they will be taken on other days & at other places, to be then & there made known.

THOS. S. ATKINS,
U. S. Com'r.

54 BACON & BASKERVILLE & OTHERS,
Appellants.
By JOS. BRYAN, *Their Counsel & Att'y.*

We hereby acknowledge legal & timely service of the within notice. This acknowledgment to have such effect only as would legal service of the notice at this time.

E. R. WATSON,
Counsel for Geo. C. Rives.

JULY 23, 1879.

55 UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Thos. S. Atkins, a United States commissioner in and for the eastern district of Virginia, do certify that, pursuant to the foregoing notice, I proceeded, at the office of Joseph Bryan, esq., No. 1002 Main street, Richmond, Virginia, at the hour of 12 m. on the 30th day of July, 1879, to take the following affidavits:

JAMES L. MAURY, being first duly sworn, deposes and says as follows:

I am a stock broker now, and have been for over 30 years; I reside in Richmond, and was in the Confederate States during the war, and chiefly in and around Richmond. The gold value of Confederate currency or treasury notes, as shown by tables kept during the war by Wm. B. Isaacs & Co., is, according to my recollection, correct, and is generally accepted in all settlements in-

THOS. S. ATKINS, *U. S. Com'r.*

56 volving the value of Confederate notes. From this table it appears that in November, 1863, the gold value of one dollar in Confederate treasury notes was from 15 to 17 for one, or, in other words, it required from 15 to 17 dollars in Confederate money to buy one dollar in gold. At these rates the gold value of $80,000.00 in Confederate States treasury notes, with interest at 6 per cent. per annum to the 28th March, 1879, would be, respectively, at 15 for one, $10,292.00 gold, and at 17 for one, $9,071.00 gold. The greatest depreciation of Confederate treasury notes, down to November 1st, 1864, was 27½ for one, at which rates the gold value of $80,000.00 of such notes, with interest to March 28th, 1879, would be about $5,439.00.

And further this deponent saith naught.

J. L. MAURY.

THOS. S. ATKINS, *U. S. Com'r.*

57 ISAAC DAVENPORT, Jr., being first duly sworn, deposes and says as follows:

I am president of the First National Bank of Richmond, Virginia. I resided in Richmond, Virginia, during the war. In fall or autumn of 1864, desiring to buy some sterling bills, and learning that they could be purchased to better advantage in Texas than here, I sent Confederate treasury notes out to Texas and did buy sterling bills at better rates

than I could here. In other words, Confederate treasury notes were then worth more there than here.

And further this deponent saith naught.

I. DAVENPORT, JR.

THOS. S. ATKINS, *U. S. Com'r.*

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Thos. S. Atkins, U. S. commissioner as aforesaid, do hereby certify that the foregoing affidavits of James L. Maury and I. Davenport, jr., were, when taken, then and there reduced to writing by me in
58 the presence of the said affiants, and by them respectively subscribed in my presence after having having been so reduced.

I further certify that I am not of counsel nor attorney to either of the parties in this suit, nor interested in the event of this cause.

I further certify that it being impracticable for me to deliver said depositions with my own hand to the court for which they were taken, I have retained the same for the purpose of being sealed up by me and speedily and safely transmitted by U. S. mail to the said court for which they were taken, and to remain under my seal until there opened.

I further certify that the fee for taking said deposition, amounting to $4.00, has been paid to me by the appellant, and the same is just and reasonable for the services performed.

THOS. S. ATKINS,
U. S. Com'r.

59 Given under my hand at Rich*Rich*mond, in the said eastern district of Virginia, this 30th day of July, 1879.

THOMAS S. ATKINS,
Commissioner as aforesaid.

(Indorsed:) In the Supreme Court of the U. S. Bacon & Baskerville and others vs. G. C. Rives & others. No. 809. October term, 1879. Affidavits touching value in controversy. Filed 21 August, 1879.

(Indorsement on cover:) No. 234. John L. Bacon and H. E. C. Baskerville, partners under the style & firm of Bacon and Baskerville et al., appellants, vs. George C. Rives, in his own right and as administrator d. b. n., &c., of George Rives, dec'd; J. Henry Rives, executor of George Rives, dec'd, and Alfred L. Rives, executor of William C. Rives, dec'd. W. Virginia C. C. U. S. Filed 21st August, 1879.

1699

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1881.

No. 234. 29

BACON & BASKERVILLE, APPELLANTS,

vs.

GEO. C. RIVES & OTHERS, APPELLEES.

NOTE OF ARGUMENT FOR APPELLANTS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 234.

BACON & BASKERVILLE, APPELLANTS,

vs.

GEORGE C. RIVES & OTHERS, APPELLEES.

Note of Argument for Appellants.

This is an appeal from the Circuit Court of the United States for the Western District of Virginia.

The suit was originally brought in the Circuit Court of Albemarle county, Virginia, and was removed therefrom to the United States Court under the Act of March 3rd, 1875. It is substantially a proceeding to subject the property of a non-resident defendant (George C. Rives) to a lien obtained by the plaintiffs under the attachment laws of Virginia upon his property in the legal ownership of a resident defendant.

The amount of the claim of the plaintiffs is unascertained, and indeed, unascertainable, save by proceedings in equity.

The case comes up on a demurrer to the bill—the facts are to be taken from the statements and allegations contained therein.

It appears from the bill that in the Summer of 1863, Bacon and

askerville, residing in Virginia,sent $131,000 of Confederate money
Col. James H. Stevens, then in Monroe, Louisiana, to be invested
Col. Stevens in the purchase of cotton on Plantations in Louisiana
nd Texas, to remain on the plantations until the end of the war.

A number of other persons were interested in this venture, but the
tire control of it was given to Bacon & Baskerville, who gave all in-
ructions deemed necessary.

Among those interested in the enterprise was the Hon. Wm. C.
ives, the uncle of the defendant, G. C. Rives.

Col. Stevens received the money in Louisiana, but died there in
ptember, 1863, without having invested it at all. Soon thereafter
e widow of Col. Stevens wrote to B. & B. informing them of these
cts. G. C. Rives, too, who was then stationed in that region, wrote
his cousin, Alfred L. Rives, the son of Mr. Wm. C. Rives, to the same
fect. G. C. Rives also wrote to his cousin that if the money which
d been entrusted to Col. Stevens was turned over to him, he could
ve it by investing it in city property, in the city of Austin, Texas, or
live stock (ranche) which he said he knew would pay well, and
uld be readily sold at any time, and that he would attend to the in-
rest of the parties concerned, and act under their instructions.

These letters of Mr. G. C. Rives were shown to B. & B. by Mr. Wm.
Rives and moved as well by the fair promises they contained as by
e advice and solicitation of Mr. Wm. C. Rives; B. & B. made Geo.
Rives their agent in the room and stead of Col. Stevens.

As there are several parties to this suit named Rives, we will here-
ter designate George C. Rives as *agent*.

The funds were turned over to Agent Rives by Mrs. Stevens in the
tter part of the year 1863, or early in 1864, with the following in-
ructions given the agent by B. & B., viz: that he should invest the
nds:

1st. In cotton on plantations in Texas, to remain thereon until the
ar was over; this being the first and chief object of the whole ven-
re, but if he could not succeed in this he was—

2d. To invest the funds in "ranche" property, meaning thereby lands

in Texas with cattle and horses thereon, and if in this he failed he was—

3rd. To invest said funds in town lots in the city of Austin, Texas.

After the receipt by the agent of the funds with these instructions, nothing was heard from him until May, 1865, when in reply to a letter from Bacon & Baskerville, written in January, 1865, he wrote in April, 1865, that he had invested their funds in the transportation of cotton, under articles of copartnership to continue during the war, and that the business was under the management of an active partner who gave his whole time and attention to it. He did not state who the active partner was, nor how much of the funds he had so invested, nor what property he had purchased therewith, nor what proceeds, if any, had accrued to him from the investment.

After the end of the war, having waited eighteen months without receiving any report or statement from their agent, Bacon & Baskerville, in November, 1866, wrote to him to Austin, Texas, asking an account of his agency, but they received no reply. They again wrote to him to the same place, in January, 1867, but to this likewise, they received no reply.

Receiving no information whatever from their trusted agent, they feared and deemed it now probable that in the convulsions succeeding the termination of the war, he had, like many others, either left the country or perhaps had died.

It was not until March, 1875, that Bacon & Baskerville learned where their agent was, and that he was not only living, but had been in the habit of visiting Virginia each summer, for several years past.

They forthwith wrote again to him requesting an account, and at the same time wrote to his cousin, Alfred L. Rives, the executor of Mr. Wm. C. Rives, upon the same subject, but to neither of these letters did they receive any reply.

They then concluded at last that their letters had been received, and that the failure of their agent to render them an account arose

from a purpose to defraud them of their property; and thereupon, as soon as possible after learning the whereabouts of their said agent, they instituted this suit to compel him to render an account, to discover what disposition or investment he had made of the funds intrusted to him, and what the proceeds of the investment were, and to subject the property of their said agent in Virginia to a lien for the amount which should be ascertained to be due them.

They learned that their agent was largely interested as devisee and legatee in the estate of his deceased father, consisting of a large real and personal estate situated in Albemarle county, Virginia, in the possession and under the control of J. Henry Rives, a resident of the State of Virginia, and C. Edward Rives, a resident of the State of New York, as administrators with the will annexed of the decedent.

The administrators *c. t. a.*, or, as we will term them for convenience, the executors, had under the will the power to sell the real estate. [A copy of the will unintentionally omitted from the record is printed herewith to be taken as a part of the record by consent of the counsel for the appellees. See appendix "A."]

In order to subject the interest of their agent in this property to a lien for their demands against him, they brought their suit in the circuit court of Albemarle county, Virginia, made the executors parties defendant, and attached the property in their possession.

Both G. C. Rives and C. Edward Rives being found within the jurisdiction of the court, personal service was also made upon them as defendants.

The subpoenas were taken out on the 22nd day of July, 1875.

At the first hearing of the cause, February 8, 1876, *the defendant, G. C. Rives, agent,* presented his petition for the removal of the whole cause from the State court to the U. S. Circuit Court; this petition the court rejected, and overruled the prayer for removal.

Thereupon G. C. Rives removed the suit by taking up the record, but the judge of the U. S. district court being Mr. Rives' uncle, declined to make any order to docket the cause. The circuit judge

(Bond) however, ordered the whole suit to be docketed, and overruled the motion of the plaintiffs to remand.

The plaintiffs thereupon filed an amended bill with leave, which was duly taken for confessed as to all the defendants, including J. Henry Rives, the resident executor.

The defendant, G. C. Rives, filed an answer on the 21st March, 1877, but afterwards, by consent, withdrew it.

At the September term, 1877, the defendant, G C. Rives, demurred to the bill, raising thereby, the plea of the statute of limitations. This was argued; and on March 28, 1879, the court rendered its decision, sustaining the demurrer, dismissing the bill and discharging the attachment issued against the executors.

From this decree the plaintiffs have appealed.

ASSIGNMENTS OF ERROR.

I. The circuit court of the United States erred in overruling the motion of the plaintiffs below to remand the cause to the State court from which it had been removed.

The controversy in the suit was not wholly between citizens of different States,and could not be fully determined as between citizens of different States.

The suit being to subject property—(in the possession of a resident executor holding the legal title)—to a lien affixed to it by the plaintiffs under the laws of Virginia, the resident executor became an indispensable party defendant to the suit by resident plaintiffs.

II. The Circuit court erred in sustaining the demurrer, and thereby sustaining in effect a plea of the statute of limitations and dismissing the bill.

The suit being against a trustee under what was in substance and effect an express and continuing trust, of a character specially within the cognizance of a court of equity, which had not been repudiated

by the trustee or abandoned by the *cestuis que trust*, was not barred by the statute of limitations.

We will consider these assignments of error in their order:

I.—On the Removal.

The plaintiffs having ascertained that their agent, Rives, who, they claimed was largely indebted to them, had large interests in property in Virginia, held by a resident executor, with authority under the will to sell the real astate, proceeded to assert their claim against the property by attaching it in the hands of the executor and bringing him before a court of equity competent to hear the cause.

Under the laws of Virginia they had the right to affix a lien for the debt due them, upon the property in the possession of the resident executor—See V. C. 1873 ch. 148 secs. 1 and 11, 12. See appendix B.

The property attached was an interest taken under a will.

The general doctrine is that a legacy or distributive share of a decedent's estate cannot be attached (Drake on Attachments, § 98 and § 47), but in Virginia the law is otherwise.

Case of adm'r: Moore v. White, 3 Gratt. 133.

Cases of legacies: Anderson v. De Soer, 6 Gratt. 363; Vance v. McLaughlin, 8 Gratt. 289.

Case of non-resident heirs: Carrington v. Didier, 8 Gratt. 260.

But attachments of such property interests cannot be effected in an action at law. In order to reach such property the creditor must bring his suit in equity (even though his demand be a legal one), and must make the personal representative *a party defendant to the bill.*

Whitehead v. Coleman, 31 Gratt. 784.

The personal representative is an indispensable party.

In many States the attachment or trustee process is merely ancillary, and does not rise to the dignity of a *suit* against the garnishee, who is not a defendant. And in Virginia in attachments *at law* he is only bound to have the property forthcoming on the return day and to answer orally. If any question arises on his answer, the jury try it "without any formal pleading."

Virginia Code 1873, ch. 148, § 19.

But in the attachment in equity the garnishee defendant is designated "a defendant" in the Statute—sec. 11; he responds to the process by answering the bill—sec. 17; the proceedings shall be the same as in other suits in chancery—sec. 11; and if he is finally adjudged liable, his liability is fixed by decree of the court against him.

Nor is the garnishee defendant a mere stakeholder. He is authorized by the statute to make defence to the attachment (section 21) which involves the right to contest the fact that anything is due the plaintiff from the principal defendant.

In most of the States he has not this right—(Drake on Attachments, § 717.)

In order to pass upon the liability of the executor to the legatee, the court must be able to bring before it, if necessary, all persons interested in the decedent's estate.

The decision involves the settlement of executorial accounts, and a final settlement and decree has in Virginia been reached in many such cases only after years of most complex litigation.

The plaintiffs in this case proceed to subject to their claim the interest of George C. Rives in his father's estate. They incidentally, and as a first step, establish their claim. But when and if established they have no certain or substantial relief, except against the executor, who, as the holder of the legal title to the property made subject to the lien, has been made a party defendant as required by law. It is immaterial whether the lien was obtained by agreement of the parties or by force of law. It is alike valid and effective, and binds the property for whatever amount may be adjudged to be due. No more could be said of a proceeding to foreclose a deed of trust.

In Gardner vs. Brown, 21. Wallace p. 36, the court considered the effect of the Removal Act of 1866 in the case of a proceeding by a citizen of Tennesee (creditor) to foreclose a deed of trust executed to a citizen of Tennessee by the debtor, a citizen of New York, who was made co-defendant with the resident trustee. The mortgagor moved to transfer the cause as to himself to the circuit court, under the provisions of the Act of July 27th, 1866.

The court held that the cause could not be removed because the

by the trustee or abandoned by the *cestuis que trust*, was not barred by the statute of limitations.

We will consider these assignments of error in their order:

I.—On the Removal.

The plaintiffs having ascertained that their agent, Rives, who, they claimed was largely indebted to them, had large interests in property in Virginia, held by a resident executor, with authority under the will to sell the real astate, proceeded to assert their claim against the property by attaching it in the hands of the executor and bringing him before a court of equity competent to hear the cause.

Under the laws of Virginia they had the right to affix a lien for the debt due them, upon the property in the possession of the resident executor—See V. C. 1873 ch. 148 secs. 1 and 11, 12. See appendix B.

The property attached was an interest taken under a will.

The general doctrine is that a legacy or distributive share of a decedent's estate cannot be attached (Drake on Attachments, § 98 and § 47), but in Virginia the law is otherwise.

Case of adm'r: Moore v. White, 3 Gratt. 133.

Cases of legacies: Anderson v. De Soer, 6 Gratt. 363; Vance v. McLaughlin, 8 Gratt. 289.

Case of non-resident heirs: Carrington v. Didier, 8 Gratt. 260.

But attachments of such property interests cannot be effected in an action at law. In order to reach such property the creditor must bring his suit in equity (even though his demand be a legal one), and must make the personal representative *a party defendant to the bill.*

Whitehead v. Coleman, 31 Gratt. 784.

The personal representative is an indispensable party.

In many States the attachment or trustee process is merely ancillary, and does not rise to the dignity of a *suit* against the garnishee, who is not a defendant. And in Virginia in attachments *at law* he is only bound to have the property forthcoming on the return day and to answer orally. If any question arises on his answer, the jury try it "without any formal pleading."

Virginia Code 1873, ch. 148, § 19.

But in the attachment in equity the garnishee defendant is designated "a defendant" in the Statute—sec. 11; he responds to the process by answering the bill—sec. 17; the proceedings shall be the same as in other suits in chancery—sec. 11; and if he is finally adjudged liable, his liability is fixed by decree of the court against him.

Nor is the garnishee defendant a mere stakeholder. He is authorized by the statute to make defence to the attachment (section 21) which involves the right to contest the fact that anything is due the plaintiff from the principal defendant.

In most of the States he has not this right—(Drake on Attachments, §717.)

In order to pass upon the liability of the executor to the legatee, the court must be able to bring before it, if necessary, all persons interested in the decedent's estate.

The decision involves the settlement of executorial accounts, and a final settlement and decree has in Virginia been reached in many such cases only after years of most complex litigation.

The plaintiffs in this case proceed to subject to their claim the interest of George C. Rives in his father's estate. They incidentally, and as a first step, establish their claim. But when and if established they have no certain or substantial relief, except against the executor, who, as the holder of the legal title to the property made subject to the lien, has been made a party defendant as required by law. It is immaterial whether the lien was obtained by agreement of the parties or by force of law. It is alike valid and effective, and binds the property for whatever amount may be adjudged to be due. No more could be said of a proceeding to foreclose a deed of trust.

In Gardner vs. Brown, 21. Wallace p. 36, the court considered the effect of the Removal Act of 1866 in the case of a proceeding by a citizen of Tennesee (creditor) to foreclose a deed of trust executed to a citizen of Tennessee by the debtor, a citizen of New York, who was made co-defendant with the resident trustee. The mortgagor moved to transfer the cause as to himself to the circuit court, under the provisions of the Act of July 27th, 1866.

The court held that the cause could not be removed because the

resident trustee holding the legal title was indispensable to the final determination of the controversy.

We are unable to distinguish that case from the one at bar. The controversy between the plaintiffs and G. C. Rives (agent) cannot be fully determined in the absence of the executor.

In Barney v. Latham, 103 U. S. 205, there were two distinct controversies, either of which might have been prosecuted to a full and final settlement irrespective of the other (pp. 213 and 214), and it was decided that in order to remove a cause in which there were several controversies, the controversies must be separable and distinct.

If the suit could not have been severed and the removable part transferred under the act of 1866, there can be no removal of the whole suit under the act of 1875.

In the case at bar the defendant, Agent Rives, being a non resident and service of process upon him personally being doubtful, the plaintiffs were compelled, in order to reach his property in the hands of a resident executor, to bring their suit in the State court and make the proceeding a suit "in rem."

It is true that in this case Agent Rives being found in the jurisdiction of the State court, personal service was had upon him, so that the suit became at once "in rem." and "in personam." While the proceeding "in personam" became effective by the service on the defendant within the jurisdiction of the court, yet it might in itself prove entirely futile if the defendant should prove insolvent. The real and substantial proceeding is that "in rem," and to this the executor is an indispensable party. He cannot be made liable in the absence of Rives, agent, for the presence of the latter is necessary that the decree of the court may protect the executor in paying what is decreed to the plaintiffs.

In Weeks v. Billings, 55 N. H. 371, suit was brought by a resident plaintiff against a resident defendant, whose property was attached in the hands of a non-resident trustee. The non-resident made a motion to remove the cause, under the act of 1866, but the court overruled the motion and held that the process, as to the non-resident trustee, was to be regarded as an attachment of the defendant's pro-

perty in his hands, and that there was "no provision by which the proceedings could be brought to a close unless the trustee and the defendant were in the same court."

The executor and the agent in this suit must both be in the same court.

The 4th section of the Act of 1875, declaring an attachment or sequestration valid to hold the property to answer final decree, applies to attachments effected by service of notice or to actual seizures by the officer; as, for instance, to attachments *at law* in Virginia, as we have shown. But this section cannot give relief to the plaintiff in cases where the liability is upon a *defendant* in a chancery suit—one who can only be made liable *as a defendant* and by decree—one who is out of court when he ceases to be a party defendant to the cause.

The liability of the defendant executor in this cause cannot be determined summarily "without formal pleadings." The determination of this matter will probably involve complicated and protracted litigation. If the removal is made, the Circuit Court of the United States may be required to settle the estate of the decedent, and to have before it as well the resident plaintiffs as the resident legatees and devisees.

II.—The Statute of Limitations.

It was settled in Kane v. Bloodgood (7 Johns. Ch. Rep.) by Chancellor Kent, "that the trusts intended by the courts of equity not be reached or affected by the Statute of Limitations, are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of this [an equity] court."

What kinds of trust come under the description of "technical and continuing," has not been definitely settled as far as we have been able to ascertain.

Each case seems to be largely determined upon its own peculiar circumstances. There may be express trusts which, as Chancellor Kent remarks, are not to be withdrawn from the operation of the

statute of limitations. There are again trusts which, though not described in technical language as such, have from the intention of the contracting parties, every element of technical express trusts.

In Love v. Watkins, 40 Cal. 568, the court having under consideration the rule by which the Statute of Limitation is applied to implied, resulting and constructive trusts, said :

"The trust which arises from the sale of land where the purchase money has been paid, is undoubtedly a resulting trust.

"It is a trust resulting from the nature of the transaction and from the intention of the parties.

* * * * * * * * *

"Like express trust, these trusts arise from a confidence reposed in the trustee, and are in accordance with the intention of the parties. In this respect they differ widely from those constructive trusts which are established by evidence and forced upon the conscience of the trustee against his will and generally to prevent the consummation of a fraud.

In the latter case the relation of the parties is hostile from the beginning, and the possession of the trustee adverse, and there being no actual confidence reposed in the trustee, there can be no pretence that according to the intent and contract of the parties the relation was to be a continuous one.

"As to the former, the relation being friendly and a real confidence reposed in the trustee, which may be intended as a continuous one so long as the relation is recognized and acted upon by the parties, the same reason that induced courts of equity to recognize the trust at all would compel them to recognize its continued existence. * * *

"The only respect in which this trust differs from an express, is as to the mode in which it is established or proven ; that is to say, there is no declaration or agreement by which the terms are stated upon which the trustee is to hold the trust property."

"When established, however, they are recognized and enforced precisely as express trusts are enforced, the only difference being that perhaps a different presumption might arise from the possession of the trustee."

"This principle is clearly stated in Tiffany and Bullard, upon Trust and Trustees, p. 19, where it is said: "*The trust, though implied from the evidence, is in reality an express trust, and will be held as such by the court.* That is, implied trusts are considered as really the expression of the donor or grantor, as those which are denominated express trusts. The difference is only in the form of language by which the trust is expressed. They derive their authority from the will of the donor, grantor, &c., as gathered from his actions or expressions." * * * * * * *

"And I have never yet met with a case, whatever the character of the trust, where the statute was held to bar the rights of the beneficiary in favor of the trustee, when the beneficiary has continued in possession according to his right and no adverse claim made by the trustee."

"And the same is true where the trustee is in possession, if the relation is acknowledged. Thus in Hovenden v. Lord Annesley, 2 Sch. & Lef. 607, Lord Redesdale said: "The possession of the trustee is that of the cestui que trust, and if the only circumstance is that he does not perform his trust his possession operates nothing as a bar, because his possession is according to his title." Love v. Watkins, 40 Cal.

"When the trust is created merely by *implication* or *construction* of law, the plea of lapse of time will be more readily admitted as a bar to any claim by the cestui que trust against the trustee. In such cases the possession of the trustee is usually to a certain extent adverse to the *cestui que trust*, for it rarely happens that such a trust is expressly recognized or admitted by the parties. * * * However, even in cases of constructive trusts, mere lapse of time will not of itself be always a bar to the relief. The party entitled to the benefit of the trust must also have been aware of his rights, and must have acquiesced in being deprived of them by the trustee. * * * Hill on Trustees, (4 Am. ed), 410. Marginal page 265

It seems that the substantial character of the trust reposed by the *cestui que trust* in the trustee will be considered by the court rather than the form adopted by the contracting parties.

We must now see if the trust which was accepted by Agent Rives

was of a nature to make the suit against him, one of which a court of equity would have "proper, peculiar, and exclusive jurisdiction."

In Story's Eq. Jurisp. § 462, it is said that "in cases of factorage and consignments, and general receipts and disbursements of money by receivers and stewards, it can scarcely be possible, if the relation has long subsisted, that very intricate and perplexing accounts should not have arisen, where, independently of a *discovery*, the remedy of the principal would be utterly nugatory or grossly defective." * * "The rules of law in all such agencies require that the agent should keep regular accounts of all his transactions with suitable vouchers; and it is obvious that if he can suppress all means of access to his books of account and vouchers, the principal would be utterly without redress, except by the searching power of a bill of discovery, and the close inspection of all books under the authority and guidance of a master in chancery. Besides agents are not only responsible for a due account of all the property of their principals, but also for all profits which they have clandestinely obtained by an improper use of that property. And the only adequate means of reaching such profits must be by such a bill of discovery."

In cases of fraud it is almost impracticable to thread all the intricacies of its combinations except by searching the conscience of the party and examining his books and vouchers—neither of which can be done by the courts of common law."

"(462 *a*). The bare relation of principal and agent does not entitle the principal to come into a court of equity, for an account of the matter can be fairly tried at law. * * * But if the defendant as agent has received sums of money for the plaintiff the purchasers and amounts of which are unknown to him, a bill praying for discovery and an account will be maintained."

In Hill on Trusts the following rule is laid down: "A suit in equity is the usual and most effectual remedy for a breach of trust. Indeed, unless some legal debt has been created between the parties or some engagement, the non performance of which may be the subject of damages at law, a court of equity is the only tribunal to which the

cestui que trust can have recourse for redress. And in any case the jurisdiction and machinery of those courts is so much better adapted to meet the exigencies of every case by enforcing the restitution of trust property, and compelling an account against the guilty parties, that any other remedy is rarely resorted to."

"(Note I.) An action at law for money had and received will not lie against a trustee while the trrust is still open, although where a final account has been stated between the parties and the trust is closed, it seems that such an action may be maintained. (Numerous cases cited)."

"(2.) Where the trust also is executed so that it is cognizable at law and nothing more remains to be done by the trustees, equity will leave the parties to their remedies at law."—Hill on Trustees, p. 808.

In the case at bar the trust was a *continuing one.* Large discretion was given the trustee as to the property to be invested in and the management of it when purchased, for *an indefinite period.* Whatever he bought, whether cattle, cotton, lands or lots, he would have been obliged to use the ordinary prudence and care required of the owners of such property in protecting it. All these matters were left to the trustee without the possibility of supervision by his *cestuis que trust.* Except the meagre information contained in the only communication ever received from their agent—that he had invested the funds "in the transportation of cotton"—the appellants know nothing of what property was bought for them by Rives; where it is situated, and what its condition is. And as he now refuses to render any account, they can never learn except by a bill of discovery and account in a court of equity.

Agent Rives may have bought property in the name of his principals (though this is highly improbable), or in the name of "G. C. Rives, trustee for Bacon & Baskerville." In either event no one would maintain that the right of the *cestuis que trust* to assert their equitable title to the property is barred by anything in the case.

The discovery and account is the preliminary step towards enforcing the trust, by requiring the trustee to point out the trust subject

The right to the discovery exists as long as the right to the property in specie would exist, if such had been purchased and remained.

The plaintiffs in this case could have no substantial relief at law.

If the trust had not been accepted by Rives, or if he had refused to execute it, the plaintiffs might have brought their action for money had and received. But he accepted the trust and executed it wholly or in part—for the plaintiffs do not know what he did besides investing in the transportation of cotton—and as to that investment they may, if they see fit, ratify his act and claim their part of the profits in the business. The defendant has said since these proceedings were commenced, that his investments had almost entirely failed (Record keep[illegible] and [illegible]rig. 34), and that he wrote to the plaintiffs requesting instructions as [illegible]o the disposition to be made of the remnant in his hands. boo[illegible] out, This acknowledged that he held the "remnant" for his *cestuis que trust*.

In Seymour v. Freer, 8 Wall. 202, the court holding that although the legal title was in the principal, yet he held it in trust for the agent, to the extent of the agent's interest; that the statute of limitations had no application, and that while it was true the agent might have brought an action at law sounding in damages for breach of the agreement, on the part of the trustee, said "this in no wise affects the *right to proceed in equity* to enforce the trust and lien created by the contract. They are concurrent remedies, either of which is preferred may be selected. *The remedy in equity is the better one.*"

See also, Oliver v. Piatt, 3 Howard 401, 409 and 411, upon the jurisdiction of a court of equity to follow a trust fund and enforce trust.

The general doctrine, that trusts are exempt from the operation of the statute of limitations will hardly be denied. "As between trustee and cestui que trust, in the case of an express trust, the statute of limitations has no application, and no length of time is a bar. Accounts have been decreed against trustees, extending over periods of thirty, forty or fifty years. The relations and privity between trustee and cestui que trust are such that the pos-

session of the one is the possession of the other, and there can be no adverse claim or possession during the continuance of the relation. Lord Justice Knight Bruce said that where one entered into possession as trustee he could not be permitted to set up a possession or title in himself adverse to the *cestui que trust*. It is the duty of the trustee if he intends to claim the estate, to resign his trust, and deliver over the possession which he received as trustee. He will be then in a position to maintain his claim, for no claim should be made through a breach of trust. And no trustee while occupying a place of trust and confidence, should be allowed to set up an adverse title. This applies to all acting as trustees, whether regularly appointed or not. It also applies to all who stand in a fiduciary relation to others, as executors, administrators, guardians and agents." 2 Perry on Trusts, § 863.

"It has been held, however, that if a trustee repudiates the trust by *clear and unequivocal* acts or words, and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust*, so that he is called upon to assert his equitable rights, the statute will begin to run from the time that such knowledge is brought home to the *cestui que trust*, and he will be completely barred at the end of twenty years, if he has been *sui juris*, or under no disability, and is capable of bringing an action to sustain his right."

"To enable the trustee, without giving up the possession, to turn it into an adverse holding against the *cestui que trust*, the evidence must be clear and unmistakable, and such adverse claim must be brought home to the *cestui que trust beyond question or doubt*. The attitude of the trustee must be hostile, and continuously so, and there must be no mistake or misapprehension as to the character of his holding by either party."

2 Perry on Trusts, sec. 864.

"A *cestui que trust* may be debarred from relief by long acquiescence in a breach of trust, though he did not originally concur in it. * * * Nor can any acquiescence be inferred until the *cestui que trust* has actual knowledge of the breach, for the reason that it is the duty of the trustee to execute the trust; and it is not the duty of the

cestui que trust to make any enquiries." * * * 2 Perry on Tr., § 850.

That the trustee in this case ever renounced his trust is not alleged or admitted, and could only be remotely inferred from his failure to answer the letters which were written to him, and which it is possible he may not have received. Such negligence, even if willful, is not a "clear and unequivocal" assertion of an adverse claim brought home to the *cestui que trust* "beyond all question."

Upon the failure of the defendant to reply to letters and inform his principals of the state of the trust fund, the decision in Kane v. Cook, 8 Cal. 449, is very pertinent.

In that case goods were consigned by the plaintiffs, who were residents of New York, to the defendant, who was a resident of California. The goods were received by the defendant and sold, but no account was rendered.

The court said, per Field, J., delivering the opinion: "It appears from the evidence, and it is stated as a fact in the opinion of the court below, that the defendant never rendered any account of sales to the plaintiffs, and there is nothing in the record which shows that they ever had any knowledge of the sales until shortly previous to the commencement of this suit. * * * It was the duty of the defendant not only to inform the plaintiffs of the sales, but to remit the proceeds. His neglect not only deprived them of their funds, but kept them in ignorance of their rights."

"To hold that the statute of limitations ran against them under such circumstances, would be to permit the defendant to take advantage of his own wrong, and to sustain a defence which in conscience he ought not to be permitted to avail himself of." * * * *

"In this diversity of opinion on the question, we are free to adopt that rule which will best tend to advance justice and prevent the perpetration of fraud, and we therefore hold that in all cases a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the Statute of Limitations." * * * "In the present case the plaintiffs are residents of New York and they looked to their consignee in California to acquaint them of

the sale of their goods. His delay of three years to impart any information cannot be reconciled with honest intentions, but necessarily leads to the conclusion that the sale was concealed for a fraudulent purpose.

To the same effect is the decision in Blount v. Robinson, 3 Jones. N. C. Eq. 73: "A owning land gave power of attorney in 1819 to B to sell it, who was to examine the title, explore the property, sell and convey it, taking bond and security, and for his trouble B was to have half of the gross proceeds. A died in 1832. B in 1853 sold the land as his own for $10,000. In 1854 A's heirs brought their bill against him."

"B's executor pleaded the statute of limitations, claiming that B held the property adversely, having bought in *a title* to the property at a sheriff's sale."

The court said: "It is a familiar doctrine, acted upon both at law and in equity, that when a confidential relation is established between parties either by act of law, as in case of co-partners, tenants in common, &c., or by agreement of the parties, as in case of a trust or agency, the rights incident to that relation continue until the relation is put an end to, and the statute of limitations and lapse of time have no application." * * * * * *

"The idea that he [the agent] by remaining *inactive* in reference to Blount [the principal] and his heirs, and *making no communication* to them from 1819 to 1853, which he was under a positive obligation to do during that time, could ~~continue~~ to acquire title in himself, and thereby have a right when he did effect a sale to appropriate the whole proceeds to himself, cannot for one moment be entertained, there being no allegation or proof that Blount's title was not in the first instance good. It does not lie in the mouth of McKay [the agent] or his representatives to say to the heirs of Blount, 'You have forfeited your rights by your laches!' Whose fault was it? Whose duty was it to make returns and communicate from time to time with Blount and his heirs?"

See also on the duty of agent acting as trustee to give notice to his principals or *cestuis que trust*. Fox v. Cash, 11 Pa. St. 207.

We have seen that although Rives was termed agent, he was in sub-

stance and fact, clothed with an express continuing trust. That his actions as such trustee, are of a character to be within the proper, peculiar and exclusive jurisdiction of a court of equity.

It is familiar law, that "when the relation of trustee and *cestui que trust* has been shown to exist, there must be evidence of a repudiation of it and of an intention to hold the property adversely before the statute will begin to run."—Jones v. McDermott, 114 Mass. ~~100~~. 403

While the possession of the trustee is not "adverse to the *cestui que trust* as between them, there is no limitation of time unless there is *a clear repudiation* of the trust brought home to the party so as to require him to act as upon a clearly asserted adverse title.—Merriam v. Hassam, 14 Allen 522.

Again "as between trustee and *cestui que trust*, in the case of an express trust, the statute of limitations does not begin to run until the trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth the estate as his own, not subject to any trust, and such repudiation and claim are brought to the knowledge of the *cestui que trust*."— Hearst v. Pujol, 44 Cal. 235. See also, 2 Perry on Trusts (chap. 28) sections 863, 864.

"Where there is no disclaimer the statute has no application to an express trust, such as we have found to exist in this case."—Seymour v. Freer, 8 Wall. 218.

In this case there has been no renunciation of the trust by the trustee, or clear and unequivocal evidence given by him to his *cestuis que trust* that he intended to hold the property adversely; on the contrary, the trustee has acknowledged that a remnant of the trust property was left in his hands, about the disposition of which, he says, he asked for instructions. This request, if made, never reached the *cestuis que trust*. And while the statement shows that the trustee did not claim adversely, it also shows that the *cestuis que trust* did not sleep on their rights. Acquiesence by them in any adverse title or claim set up by their trustee cannot be inferred until actual knowledge thereof is brought home to them

Nor can laches be attributed to the plaintiffs, because their failure to pursue their agent arose from ignorance of the condition of the

trust fund, and, indeed, the location of the trustee himself—and this ignorance arose, as it now appears, from the failure of the trustee to report; or even to answer letters written to him. Had he acted properly, their position might be different; but when to him is due their ignorance of the whole transaction, he will not be heard to plead that they were guilty of laches.

"It is the duty of the trustee to execute the trust, and it is not the duty of the *cestui que trust* to make enquiries"—2 Perry on Trusts, § 850—citing Prevost v. Gratz, 1 Peters, c. c. 66, 367.

In the same case (6 Wheaton 497), Mr. Justice Story, deliving the opinion of the court, said:

"It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence, and calls more loudly upon a court of equity to grant ample and decisive relief."

See also Charter v. Trevelyan, 11 Clark & Finnelly, 738.

The same doctrine and rules above set forth have been approved in various decisions by the Supreme Court of Texas.

In White v. Leavitt, 20 Texas, 703, goods had been consigned for sale to White & Co., receiving, forwarding and commission merchants.

The plaintiffs alleged that the defendants (White & Co.) had sold the goods and converted the money to their own use and refused to pay.

The defendants pleaded the Statute of Limitations.

The court said: "The proof shows that the goods were held and disposed of by White & Co. *in trust* for Leavitt, and there being no evidence that the trust was *ever repudiated*, the Statute of Limitations did not run upon the cause of action; *as it has been often decided by this court.*"

Soo, too, in Grumbles v. Grumbles, 17 Texas, 472. The court, citing

the same rule as above laid down, proceeded to say: "It is believed that in all cases where the relation of *cestui que trust* and trustee is created *by contract between the parties*, notice or some act of such notoriety that it should be presumed to be known to the *cestui que trust* should be proven before the relationship should be dissolved." * * * "The consequence of dispensing with notices, or something of such notoriety as would be a presumption that it was known to the *cestui que trust*, would be such as could not be tolerated."

In conclusion we submit:—

I. That the cause should be remanded to the circuit court of Albemarle county, from which it was removed; or, if the removal of the cause is considered to be within the provisions of the Removal Act of 1875,

II. The decree sustaining the demurrer and dismissing the Bill should be reversed, and the defendants required to answer the Bill.

Respectfully submitted,

JOSEPH BRYAN,
Counsel for Appellants.

APPENDIX "A."

Will of George Rives—Made 20th May, 1873.

Being now of sound mind and body, but mindful of the uncertainties of life, I hereby make and declare this to be my last will and testament as follows:

1st Item. I give to my wife Maria F. legal dower in all I possess, with the right of election to take instead and exchange thereof all the public bonds and stock I hold, to hold the same during her life, and the reversion to be disposed of as shall hereafter be directed.

2nd Itim. I bequeath to my son Edward and daughter Rosalie each ten thousand dollars in advance, to be paid to them from the first moneys that can be realized from my estate other than that previously placed to the choice of my wife. The said advance to my son Edward to bear interest until paid from 1st January, 1873, he supporting himself from that date without aid from me. The advance to my daughter Rosalie to bear interest from my death.

3rd Item. The residue of my estate, embracing reversion of dower, I devise to all my children to be equally divided among them, except my son Robert, to whom I am indebted in an amount to make any bequest in his favor unnecessary. I commend my son Robert to the justice and kindness of my other children, and especially to the care and protection of my dutiful wife.

4th Item. I desire no account shall be taken of excess in advances made to my sons George and Henry; but in that event I require them to relinquish their right of inheritance in reason of full blood, and to take equally with the half blood in inheritance from their brother Robert; and on part of my son Edward and daughter Rosalie I exact a like surrender of their exclusive right of inheritance in any property remaining unsold in Chicago standing in right of their mother, to the end that each of my children shall share alike in this re-

sidiary provision of my will. The sacrifice on either side is inappreciable, and the strife otherwise I shonld greatly fear and deplore. I urge my children to magnanimity, and invoke their candid construction of my motives. They are all equally dear to my affections, and I gratefully acknowledge equal duty from each. My sincere desire has been to do justice.

5th Item. I forbear to appoint an executor, not seeing whom it would best suit to act as such; but leave it to my heirs to choose an administrator of their own choice, and agreeing on the compensation as shall seem to them proper. And such administrator of their selection I hereby give the power of selling any and all my real estate, and exonerate hereby and relieve of the duty of giving security, as the law would otherwise require.

In testimony of the foregoing will as written in my own hand, and therefore not requiring witnesses, and as the true exponent of my last wishes, I have hereunto put my signature this 20th day of May, in the year 1873.

GEORGE RIVES.

The interlineations of "except," in 4th item, and "heirs," 5th item, were made when signing the foregoing will.

GEORGE RIVES.

At a court held for Albemarle county September 7th, 1874.

This paper writing purporting to be the last will and testament of George Rives, deceased, was produced into court, and E. R. Watson and R. J. Hancock being sworn as witnesses, proved that they were well acquainted with the handwriting of said George Rives, and that the body of said paper, as well as the name of the testator signed thereto, with the memorandum as to interlineations and the signature thereto, are all in the genuine handwriting of the said George Rives, and upon said proof, the paper writing aforesaid is ordered to be recorded as the last will and testament of the said George Rives, deceased.

Teste:

H. B. BURNLEY, D. C.

APPENDIX "B."

Code of Virginia, edition 1873. *Chapter* 148—*Title Attachments.*

§ 1. When any suit is instituted for any debt, or for damages for breach of any contract, on affidavit stating the amount and justice of the claim, that there is present cause of action therefor, that the defendant or one of the defendants is not a resident of this state, and that the affiant believes he has estate or debts due him within the county or corporation in which the suit is, or that he is sued with a defendant residing therein, the plaintiff may forthwith sue out of the clerk's office an attachment against the estate of the non-resident defendant for the amount so stated.

§ 11. A claim to any debt, or to damages for breach of any contract, against a person who is not a resident of this state, but who has estate or debts due him within the same, may, if such claim exceed twenty dollars, exclusive of interest, be maintained in any court of equity for a county or corporation in which there may be any such estate, or a defendant owing any debt to such non-resident. When a person has such claim, or when a person claims to be entitled in equity to any money or property from a person against whom and for which an attachment might be sued out of a clerk's office, if the claim were recoverable at law, there may be an affidavit, according to the nature of the case, conforming as near as its nature will admit, to what is specified in previous sections; and such affidavit may be at the time of or after the institution of the suit. Upon such affidavit the plaintiff may require the clerk to endorse on a summons an order to the officer to whom it is directed, to attach the specific property (if any be mentioned in the affidavit), and the debts due, or to become due, by other defendants (if any) to the defendant against whom the claim is, and also any other estate of that defendant, whether in his own hands or in the hands of other defendants. Any attachment under this section shall be executed in the same manner, and shall have the same effect as at law, but the proceedings therein shall be the same as in other suits in chancery. And the court, or in the vacation thereof, a judge of a circuit court may interpose by injunction, or the appointment of a receiver, or otherwise, to secure the forthcoming of the specific property sued for, and so much other estate as will probably be required to satisfy any future order or decree that will be made in the cause.

§ 12. The plaintiff shall have a lien from the time of the levying of such attach-

ment, or serving a copy thereof as aforesaid, upon the personal property, choses in action, and other securities of the defendant against whom the claim is, in the hands of or due from any such garnishee on whom it is so served, and on any real estate mentioned in an endorsement on the attachment or subpœna, from the suing out of the same.

§ 17. When any garnishee shall appear, he shall be examined on oath. If it appear, on such examination, or by his answer to a bill in equity, that at or after the service of the attachment he was indebted to the defendant against whom the claim is, or had in his possession or control any goods, chattels, money, securities, or other effects belonging to the said defendant, the court may order him to pay the amount so due by him, and to deliver such effects to such person as it may appoint as receiver; or such garnishee, with the leave of the court, may give bond, with sufficient security, payable to such person, and in such penalty as the court shall prescribe, with condition to pay the amount due by him, and have such effects forthcoming, at such time and place as the court may thereafter require; provided, that the judgment debtor may claim that the amount so found due from the garnishee shall be exempt from the payment of the debt to the judgment creditor; and if it shall appear that the said judgment debtor has not claimed and held as exempt the amount of his homestead in other property or thing, then the court shall not render a judgment for the amount so found due in favor of the judgment creditor, except it be for the excess of the same over and above the homestead exemption.

§ 19. When it is suggested by the plaintiff in any attachment at law, that the garnishee has not fully disclosed the debts due by him to or effects in his hands of the defendant in such attachment, the court shall cause a jury to be impaneled, without any formal pleading, to inquire as to such debts and effects, and proceed, in respect to any such found by the jury, in the same manner as if they had been confessed by the garnishee. If the verdict be in favor of the garnishee, he shall have judgment for his costs against the plaintiff.

§ 21 Either of the defendants in any such attachment, or any garnishee, or any party to any forthcoming or replevy bond given as aforesaid, or the officer who may be liable to the plaintiff by reason of such bond being adjudged bad, may make defence to such attachment, but the attachment shall not thereby be discharged or the property levied on released.

16-99

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1881. 29

JOHN L. BACON AND H. E. BASKERVILLE, PARTNERS UNDER THE STYLE AND FIRM OF BACON & BASKERVILLE, ET AL., APPELLANTS;

vs. [No. 234

GEO. C. RIVES, IN HIS OWN RIGHT, AND AS ADMINISTRATOR D. B. N., &C., OF GEO. RIVES, DEC'D; J. HENRY RIVES, EXECUTOR OF SAID GEO. RIVES, DEC'D; AND ALFRED L. RIVES, EXECUTOR OF WM. C. RIVES, DEC'D.

Brief of E. R. Watson, Counsel for Appellee, George C. Rives in his own right.

E. R. WATSON.

December 24, 1881.

Whittet & Shepperson, Printers, 1001 Main St., Richmond, Va.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1881.

JOHN L. BACON AND H. E. BASKERVILLE, PARTNERS UNDER THE STYLE AND FIRM OF BACON & BASKERVILLE, ET AL., APPELLANTS;

vs. [No. 234

GEO. C. RIVES, IN HIS OWN RIGHT, AND AS ADMINISTRATOR D. B. N., &C., OF GEO. RIVES, DEC'D; J. HENRY RIVES, EXECUTOR OF SAID GEO. RIVES, DEC'D; AND ALFRED L. RIVES, EXECUTOR OF WM. C. RIVES, DEC'D.

Brief of E. R. Watson, Counsel for Appellee, George C. Rives in his own right.

I have seen no brief on the other side; but I presume that there are but two questions involved in this case, viz.:

First. Was the cause properly removed from the State court to the Federal court? And,

Second. Was the demurrer to the plaintiff's bill properly sustained?

THE REMOVAL.

All the requisites for removal are found in this case,—as prescribed by the Act of March 3, 1875.

The record shows—

I. That the amount involved is far more than $5,000, exclusive of costs.

II. The application to the State court for removal was

before any trial or hearing in that court, and was accompanied by a proper bond.

III. The petition for removal and copy of the record from the State court were filed in the Federal court on the *first* day of the term of said court *next* after the filing of the petition.

IV. The suit was by citizens of the State in which the suit was brought "against a citizen of the same, and a citizen of another State, * * * * and is a suit in which there can be a final determination of the controversy so far as concerns him" (viz., Geo. C. Rives, the Texas defendant, and petitioner for removal), "without the presence of the other defendants as parties in the cause."

(These quotations from the statute are from Dillon on Removals, note 14, pp. 10, 11.)

The *only* defendant who was a citizen of Virginia was J. Henry Rives, made such as one of the executors of George Rives, deceased. But he was no party to, and had no interest in the "controversy" between the plaintiffs and Geo. C. Rives; and for the determination of which controversy there was no necessity whatever for the presence of J. Henry Rives and his New York associate, Ch. Edward Rives, as executors of George Rives, deceased. The making of them parties, was in the nature of *execution or final process*, as a means of satisfying the recovery, should there be one, *after* the determination of the controversy between the plaintiffs and Geo. C. Rives.

The plaintiffs might at any time have dismissed the suit as against these *mere garnishees*, without in any manner affecting the determination of their controversy with Geo. C. Rives, there being no connection between the *termination* and *satisfaction* of that controversy. And Geo. C. Rives could not be required to remain in the State court, for the determination of his "separable controversy" with the plaintiffs, with which the executors of Geo. Rives had no concern, merely because plaintiffs, as a matter of expediency, and to save time, or to render more certain the collection of

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1881.

BACON AND BASKERVILLE, ET AL., - - Appellants,

vs.

GEORGE C. RIVES, ET AL.

In printing the Brief in this case, of Counsel for the Appellee, Geo. C. Rives, the following portion of it as prepared, and which ought to have been inserted just after the Note on page 3, was, by inadvertence, omitted, viz:

THE DEMURRER.

That the defence of the Statute of Limitations may be properly raised by demurrer to the Plaintiff's bill, is plain from the following authorities, viz:

1 Sto. Eq. Pl. (Ed. 1848) p. 517, Sec. 484.
" 757 " 751.
" 766 " 760.

Hudson vs. Wheeler, 34 Texas R. 362, &c.

What is styled in the transcript an "amended" bill was in fact a *substitute*, by consent, for the original bill. This accounts for its being addressed to the Judge of the State Court, and also explains why the Demurrer is to *the Bill*, and not to the *amended* Bill.

their claim against Geo. C. Rives, should they establish one in the principal suit, chose to make Geo. Rives' executors defendants to that suit, and one of them was a citizen of Virginia. If this be not so, then a citizen of any State may be sued in the State courts of each and every other State in which he may chance, with or without his agency or knowledge, to have a foot of land in possession of, or a dollar due him from a citizen of the State in which the suit is brought; and this, to the entire exclusion of all right on his part to draw his adversary into the *common*, and therefore impartial tribunal, provided by the constitution and laws of the Federal government, for the determination of controversies between citizens of different States.

These views, it is respectfully submitted, are fully sustained by the decisions of this court in *Removal Causes*, 100 U. S. 457, and *Barney* v. *Latham*, 103 U. S. 205.

[NOTE.—Though perhaps not important, it may not be amiss to call attention to the fact, that Alfred L. Rives, executor of Wm. C. Rives, deceased, and a citizen of Alabama, who was made a defendant because his testator contributed a part of the Confederate bonds involved in the Texas "venture," united in the application for removal.]

WHAT STATUTE APPLIES?

The last clause of section 20 of the Code of Virginia, (ed. 1873,) p. 1002, provides that, "Upon a contract which was made and was to be performed in another State or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such State or country."

That Geo. C. Rives was a citizen of Texas when the alleged contract was made with him, and that the same was to be performed there, appears from the bill. For—

1. In the caption thereto he is styled "a *non-resident* of the State of Virginia."

2. It alleges that the Confederate bonds were first sent to Col. Stevens to be invested in Louisiana *and Texas*.

3. Stevens died on his way to Texas, and the bonds were turned over to Geo. C. Rives, on the strength of representations made by him *in letters*, that if the funds should be turned over to him he could invest in city property in the city of Austin, Texas, or in live stock (ranche), which he knew would pay well," &c.

4. Plaintiffs say they confided the bonds to George C. Rives, with instructions to invest either "in cotton on plantations in Texas, to remain thereon until the war was over;" or in "lands in Texas, with cattle and houses thereon;" or "in town lots in the city of Austin, Texas."

5. The alleged contract was plainly made by correspondence; it does not appear that there was ever an interview in Virginia, or elsewhere, between plaintiffs and Geo. C. Rives; and plaintiff's letters to said Rives were addressed, so far as their address is given in the bill, to him at "Austin, Texas," (p. 12.)

When the Right to Sue Accrued.

The bill says the funds were confided to Geo. C. Rives, "in the latter part of the year 1863, or early in the year 1864." (p. 11.)

No time being specified when Rives should account, he was bound to do *so in a reasonable time*, which was soon after the close of the war, say 1st July, 1865.

No demand was necessary as a preliminary to the right to sue.

Mitchell v. *McLemore*, 9 Texas R. 151.

And in my *notes* used at the hearing in the court below, I find a reference under this head to *Sayles' Texas Practice*, sec. 213, p. 217, the relevancy of which I cannot now verify, not having the book.

If demand had been necessary, it was made, the bill says, as early as November, 1866, and again in January, 1867.

When Suit was Brought.

The subpœna was sued out of the clerk's office of the State court on the 22d July, 1875, more than *ten* years after

the right of action had accrued, assuming that no demand was necessary; more than *nine years and a half* after demand *was* made in November, 1866, and *eight years and a half* after the *second* demand, which was made in January, 1867.

STATUTES OF LIMITATION.

By the statute of *Virginia*, the right to sue upon such a contract as is set out in the bill is limited to *five* years after the right of action has accrued, unless it be for a settlement of partnership accounts, in which case suit may be brought "until the expiration of *five* years from a cessation of dealings in which they are interested together, but not after." (Code of 1873, p. 999, sec. 8.)

It is conceded, however, that by virtue of acts of the Virginia legislature, passed during and since the war—especially the act of March 2, 1866, Sec. 7—the running of the statute of limitations was suspended from some time in April, 1861, until January 1, 1869. (*Connecticut Mutual Life Ins. Co.* v. *Duerson's Ex'or*, 28 Grat. 630 (643); *Johnston* v. *Wilson's Adm'r*, 29 Grat. 379 (384).)

So that, supposing plaintiff's right of action to have accrued only on the 1st January, 1869, (and whatever right to sue they ever had certainly accrued before that time, whether for simple breach of contract or for settlement of partnership accounts, and whether demand was or was not necessary as preliminary to the right to sue,) that right was barred, if the Virginia statute be applicable, on the 1st January, 1874—nearly thirteen months before suit *was* brought.

If, however, the Texas statute controls the case, as I suppose it does, the right to sue was barred *after the 30th March*, 1872; for that statute prescribes *two years* as the period of limitation, (1 Texas Laws, 758; and Sayles' Texas Practice, p. 231, Sec. 234); but by the constitution of Texas, the *running* of the statute was suspended until the 30th March, 1872. (Sayles' Texas Pr. p. 220, Sec. 216.)

QUESTION OF TRUST.

Trusts which are not within the statute of limitations are

such as are "the mere creatures of a court of equity, and not within the cognizance of a court of law." *Kane* v. *Bloodgood*, 7 John. Ch. 90.

"The trusts intended by the courts of equity as not to be reached or affected by the statute of limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of a court of equity." *Ib.* 114.

"As for those other trusts, which are the ground of an action at law, the statute is, and in reason ought to be, as much a bar in the one court as in the other. The statute is a bar to a bill for an account, when it would be a bar to an action of account at common law for the same matter, and for which the party might have had his action of account." *Ibid.*

"Where there is a legal and an equitable remedy, in respect to the same subject-matter, the latter is under the control of the same statute with the former." *Ib.* 118.

Redwood v. *Riddick*, 4 Munf. 222, was an instance of a trust against which the statute of limitations was not allowed to be pleaded in equity; and the court held that the "criterion" which determined it to be so was the fact that the defendant "was not amenable to a recovery * * * by an action at common law."

"The rule that trusts are not affected by statutes of limitation was, in the earlier cases, very loosely expressed, and gave rise to erroneous decisions. Chancellor Kent, having been misled by them in the case of *Carter* v. *Murray* (5 John. Chan. 522), examined the subject very elaborately in the case of *Kane* v. *Bloodgood* (7 John. Chy. R. 90); and, in a review of all the cases, laid down the rule that trusts not affected by statutes of limitations are those technical and continuing trusts not at all cognizable at law, but which fall within the peculiar and exclusive jurisdiction of courts of equity. All trusts which are cognizable at law are not withdrawn from the operation of the statute. Persons who receive money to be paid to another, or who misapply money

placed in their hands for a particular purpose, the reciprocal rights and duties founded upon the various species of bailments, * * * are cases of express and direct trust; but, being cognizable at law, are within the reach of the statute. * * * All implied and constructive trusts, all which are cognizable at law, are subject to the bar of limitation; and equity applies the same limitation to equitable demands that it applies, in analagous cases, at law. It is only where the trust is the mere creature of equity, exclusively cognizable within that jurisdiction, and is a subsisting, continued, and acknowledged trust, that the statute has no operation. *Tinnen* v. *Mebane*, 10 Texas R. 246 (252)."

In *Humbert* v. *Rector, &c., of Trinity Church* (7 Paige's Chy. R. 195), the Chancellor uses this language, viz.: "Here, if the complainants would have had the right to come into this court upon the case made by the bill, had such bill been filed in time, they still had a concurrent remedy in a court of common law. And, in cases of that kind, time is as absolute a bar to discovery or relief in equity as it would be in a suit at law in analogy to the statute of limitations."

Authorities to the same effect might be multiplied indefinitely.

Geo. C. Rives, according to the allegations of the bill, was an ordinary agent, charged with the simple specific duty of investing Confederate bonds for the benefit of plaintiffs, in Texas property. If these bonds went into his hands as late as "early in the year 1864," then even before the war ended, and certainly at any time after its close, he was liable to an action on the case for *not investing*, if he was delinquent in that respect; and equally liable to the same action if he had made the investment, in whole or in part, and failed or refused to give an account of it. The case of *Lockey* v. *Lockey*, decided by Lord *Macclesfield*, and referred to by Chancellor *Kent*, (*Kane* v. *Bloodgood*, 7 John. Chy. R. 113,) appealed far more strongly to a court of equity, as constituting *a trust*, exempt from the bar of the statute, than that now before the court. And yet it was held by Lord *Macclesfield*

that because the defendant *might* have been sued at law, the statute *was* a bar in equity. Lord *Readesdale* approved this decision, and Chancellor Kent says of it: "This single case, resting upon such authority, and with such marked and significant discrimination between the character of the trusts that are within and without the operation of the statute, appears to me decisive upon the point now under consideration." (7 John. Chy. R. 114.)

The plaintiffs acknowledged in their bill that Geo. C. Rives informed them, by letter dated January 27, 1865, and received by them "a month or more thereafter," that as their agent he had wholly disregarded their instructions, and invested their property in a manner "which they by no means approved."

From this moment the plaintiffs had a clear and well defined right of action at law, in which they might have recovered full damages for the injury, if any, occasioned by their agent's disregard of the instructions given him.

Fraud.

It will be seen by reference to page 15 of the transcript, that after Geo. C. Rives had filed his *answer*, he withdrew it by leave of court, and with consent of plaintiff's counsel; and by like leave and consent filed his demurrer. And plaintiff's counsel agreed that "said demurrer shall be considered as supported by answer properly denying fraud," &c. In this, defendant's counsel was under some misapprehension as to the provision of the thirty-second equity rule of the court. But this is wholly immaterial. What he meant to rely on is this, viz: That the bill contains no such allegation of fraud as, if true, would defeat the bar of the statute of limitations. Or rather it contains no allegations of fraud *at all*. It does indeed charge "that the retention by the said Geo. C. Rives, in his own possession of the whole of the proceeds of his investment of the $131,000, * * and his silence as to his trust for nearly ten years, and his failure to render * * any account of his stewardship *arose from an intention on his part to defraud*," &c.

It is not a fraudulent "intention" alone that will prevent the bar of the statute. There must be some *act* of omission or commission designed and *calculated* to hinder or delay the plaintiff in the assertion of his right. Every debtor who *retains* what he ought to pay, and is able to pay to his debtor, is guilty of *fraud in fact* as well as in intention; yet when sued on his bond which has been due more than twenty years, or on open account due more than five years, such fraud is no answer to the statute.

And so as to an agent or bailee: He may "fail to render an account of his stewardship," from the most dishonest motive, viz., because he *intends to keep what he can*, and as long as he can, what belongs to his principal; yet such conduct as this, whilst *fraudulent*, is no answer to the statute of limitations, because it has no tendency to hinder such principal in the assertion of his rights.

And the *mere* "silence" of an agent stands on the same footing. It is simply his "failure" to account; unless it be accompanied by the *concealment* of something which it was his *duty* to disclose, *and the disclosure of which was necessary to enable the principal to assert his rights.* The rule is, "that if the defendant, by his own act, has necessarily prevented the plaintiff from prosecuting his suit at an earlier day, he cannot avail himself of his own fraudulent conduct as a shield for his protection." *Munson* v. *Hallowell*, 26 Texas R. 475 (486).

Now, in this case there is no *pretence* on the part of the plaintiffs that they have been prevented from suing at an earlier day by any conduct of George C. Rives—unless it is to be found in the allegation that, having written to him *twice* after hearing from him in April, or May, 1865, and receiving no answer, "they had almost come to believe that the said Rives had either died or left the country."

They wrote to no third party in Texas. They had no reason to believe Geo. C. Rives had changed his residence. It is not alleged that he *had*, and the presumption is he had *not*. They had reason to believe, and *did* believe, that their

letters had all been received by him there; for they say that they "were never returned to the writers through the dead-letter office." And even when, in March, 1875, they learned "accidentally" that Geo. C. Rives was not only living, but for several years past had visited Virginia each summer, they make no enquiry where he had thus visited, but write to Alfred L. Rives, who lived in *Alabama!* But they had no need to make enquiry *anywhere*. There is not a fact stated in the bill *tending* to show that plaintiffs had the least reason to doubt *at any time* after their contract with Rives in 1863, or 1864, that process, if issued, would be promptly served on him at the place where they had always addressed him. If they were ignorant of his "whereabouts" at any time, it was through their own gross neglect. And as "it cannot be questioned that a plaintiff cannot avail himself" even "of *fraud* as an excuse for his delay, if it is through his own neglect or fault that he fails to discover it": (26 Texas, 481),—with how much less reason or justice can he claim to be excused because he *intimates* (without alleging) that he was in the dark as to defendant's place of abode, when, for aught that appears or is averred, he was, and had been all the time, just where he was at the date of the contract; and when there was an utter failure on plaintiff's part to go, or send, or write to Texas—except to *write* to defendant himself!

Plaintiffs allege that "in 1874, George Rives, the father of the defendant, Geo. C. Rives, died in the county of Albemarle, Virginia, possessed of a large estate, real and personal;" and that said defendant, Geo. C. Rives, "is to a considerable extent interested therein." And I submit, that plaintiff's delay in suing, if they entertained the wish and purpose to sue, was due to the fact that Geo. Rives, the father, *did not die sooner*, rather than to any ignorance of any fact whatever necessary to enable them to sue. But the fair inference from the whole bill is that plaintiffs *never intended to sue Geo. C. Rives in Texas;* and that this, and this alone, was the reason why they did not sue, until it was

too late to sue any where. And as to the delay which occurred from the father's death, in 1874, till the 22d July, 1875, (when the suit was brought,) that could *not* have been induced by ignorance of the son's "whereabouts," for by sec. 11 of chap. 148 of the Code of Va. (ed. 1873,) it was only necessary for plaintiffs to make affidavit that Geo. C. Rives, to the best of their belief, was a *non-resident of Virginia*, to authorize them to file their bill, and on establishing their claim (which they might do, though he never heard of the suit), have satisfaction decreed them out of the attached effects. It was not at all necessary to know *in what State* he lived.

So much for the excuse of delay for not suing, as an answer to the statute, on the ground of ignorance of defendant's "whereabouts." If it existed, it was produced by plaintiff's gross neglect, and not by deception, misrepresentation, or other fraud of Geo. C. Rives,—as appears on the face of the bill.

As to ignorance of the subject-matter of the suit, nothing of that sort is pretended. As already stated, the right to sue for breach of contract was complete, and plaintiffs confess full knowledge of it in April or May, 1865. And the same letter which gave them this knowledge informed them of the partnership in the business of transporting cotton which their agent had entered into, "to continue during the war." But this information furnished no new cause of action. There was no partnership, so far as plaintiffs were concerned. There was no agreement or *intention* on their part, or on that of Rives, to form such partnership. There was no *community* of interest between them. Rives had no right, as against plaintiffs, to any share of *profits;* and plaintiffs were under no liability to any one for *losses*. Without these incidents there could be no partnership. (1 Collyer's Law of Partnership, 7, and note 9.) Rives, therefore, was still only plaintiff's agent. True, in suing him as such, either at law or in equity, they had a right to recover the profits, if any, which their agent had made with their

money. But their suit, no matter in what form or in what forum, must have been against him *as agent merely*. Nor was it at all necessary, in order to the institution of their suit, that they should know who *their agent's* "active partner" was; nor "how much of their funds he had invested" in such partnership; nor "what property he had purchased therewith." All they needed to know was that Rives had invested their funds in a partnership for the transportation of cotton, and that the partnership was at an end. This they know in April or May, 1865, at which time, as at any time afterwards, they might have filed their bill for an account of their agent's transactions, including those of his "partnership" in the transportation of cotton, and *any other* in which he had embarked plaintiff's funds.

Plaintiffs do not *pretend* that they have acquired any information touching the *subject-matter* of their suit which they did not possess in April or May, 1865. And yet, if they were entitled to any relief, or to any account, in the suit which they have brought, the frame and scope of their bill is such as would doubtless entitle them to an account of *all* of their agent's *dealings with their funds*, whether in the purchase of cotton, or ranche property, or town lots, or in *any other* lawful business, and including of course the "partnership" for the transportation of cotton, if indeed that was a lawful business. This is conclusive to show that neither defendant's "retention" of plaintiffs' property, nor his "silence" for nearly ten years, nor his "failure" to render an account, in respect to which matter alone fraudulent *intent* is charged, (not that plaintiffs were thereby *defrauded* or induced to delay suing,) constituted any obstacle or hindrance whatever in plaintiffs' way, or had anything to do with their failure to bring their suit at an earlier day. Indeed, *they do not allege that such was the case.*

It is respectfully submitted, therefore, that applying the law to the allegations of the bill, these conclusions follow, viz:

1. That whatever cause or causes of action the plaintiff

may at any time have had against Geo. C. Rives, accrued at least as early as May, 1865.

2. That it does not appear from the bill, that at any time since the right of action accrued, plaintiffs were ignorant of any fact necessary to enable them properly to assert their rights against the defendant.

3. That if in fact any such ignorance *did* exist, it plainly appears on the face of the bill that it was due to the gross neglect of plaintiffs, and in no degree to any fraud or contrivance of the defendant.

4. That hence there is no allegation in the bill of fraud, or of any other fact sufficient, even if true, to take the plaintiffs' case out of the statute of limitations.

5. That as the plaintiffs' suit was not brought until the 22d July, 1875—more than *two* years after the Texas statute, and more than *five* years after the Virginia statute, had been running against them (making proper allowance for the time during which the respective statutes were suspended)—plaintiffs' right of action was barred when their suit was brought, whether the one statute or the other be applicable to the case.

6. And, therefore, that it was right in the court below to sustain the demurrer and dismiss the bill.

Respectfully submitted,

E. R. WATSON.

December 24, 1881.